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CASES OF GENERAL VALUE AND AUTHORITY

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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN.

VOLUME 105.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
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NEW HAMPSHIRE. — (64) **10**; (62) **13**; (65) **23**; (66) **49**; (67) **68**; (68) **73**; (69) **76**; (70) **85**; (71) **93**; (72) **101**.

NEW JERSEY. — (43 N. J. Eq.) **3**; (44 N. J. Eq.) **6**; (50 N. J. L.) **7**; (51 N. J. L.; 45 N. J. Eq.) **14**; (46 N. J. Eq.; 52 N. J. L.) **19**; (47 N. J. Eq.) **24**; (53 N. J. L.) **26**; (48 N. J. Eq.) **27**; (49 N. J. Eq.) **31**; (54 N. J. L.) **33**; (50 N. J. Eq.) **35**; (55 N. J. L.) **39**; (51 N. J. Eq.) **40**; (56 N. J. L.) **44**; (52 N. J. Eq.) **46**; (57 N. J. L.; 53 N. J. Eq.) **51**; (54 N. J. Eq.; 58 N. J. L.) **55**; (59 N. J. L.) **59**; (55 N. J. Eq.) **62**; (60 N. J. L.) **64**; (56 N. J. Eq.) **67**; (61 N. J. L.) **68**; (62 N. J. L.) **72**; (57 N. J. Eq.) **73**; (63 N. J. L.) **76**; (58 N. J. Eq.) **78**; (64 N. J. L.) **81**; (59, 60 N. J. Eq.) **83**; (65 N. J. L.) **86**; (61 N. J. Eq.; 66 N. J. L.) **88**; (62 N. J. Eq.) **90**; (67 N. J. L.) **91**; (63 N. J. Eq.) **92**; (68 N. J. L.) **96**; (64 N. J. Eq.) **97**; (69 N. J. L.) **101**; (65 N. J. Eq.; 70 N. J. L.) **103**; (66 N. J. Eq.) **105**.

NEW YORK. — (107) **1**; (108) **2**; (109) **4**; (110) **6**; (111) **7**; (112) **8**; (113) **10**; (114) **11**; (115) **12**; (116, 117) **15**; (118, 119) **16**; (120) **17**; (121) **18**; (122) **19**; (123) **20**; (124, 125) **21**; (126) **22**; (127) **24**; (128, 129) **26**; (130, 131) **27**; (132, 133) **28**; (134) **30**; (135) **31**; (136) **32**; (137) **33**; (138) **34**; (139) **36**; (140) **37**; (141) **38**; (142) **40**; (143) **42**; (144) **43**; (145) **45**; (146) **48**; (147) **49**; (148) **51**; (149) **52**; (150) **55**; (151) **56**; (152) **57**; (153) **60**; (154) **61**; (155) **63**; (156) **66**; (157) **68**; (158, 159) **70**; (160) **73**; (161, 162) **76**; (163, 164) **79**; (165) **80**; (166, 167) **82**; (168) **85**; (169, 170) **88**; (171) **89**; (172) **92**; (173) **93**; (174) **95**; (175) **96**; (176) **98**; (177) **101**; (178) **102**; (179) **103**; (180) **105**.

NORTH CAROLINA. — (97, 98) **2**; (99, 100) **6**; (101) **9**; (102) **11**; (103) **14**; (104) **17**; (105) **18**; (106) **19**; (107) **22**; (108) **23**; (109) **26**; (110) **28**; (111) **32**; (112) **34**; (113) **37**; (114) **41**; (115) **44**; (116) **47**; (117) **53**; (118) **54**; (119) **56**; (120) **58**; (121) **61**; (122) **65**; (123) **68**; (124) **70**; (125) **74**; (126) **78**; (127) **80**; (128) **83**; (129) **85**; (130) **89**; (131) **92**; (132) **95**; (133) **98**; (134) **101**; (135) **102**; (136) **103**.

NORTH DAKOTA. — (1) **26**; (2) **33**; (3) **44**; (4) **50**; (5) **57**; (6, 7) **66**; (8) **73**; (9) **81**; (10) **88**; (11) **95**; (12) **102**.

OHIO. — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**;

(53 Ohio St.) **53**; (54 Ohio St.) **56**; (55, 56 Ohio St.) **60**; (57 Ohio St.) **63**; (58 Ohio St.) **65**; (59 Ohio St.) **69**; (60 Ohio St.) **71**; (61 Ohio St.) **76**; (62 Ohio St.) **78**; (63 Ohio St.) **81**; (64 Ohio St.) **83**; (65 Ohio St.) **87**; (66 Ohio St.) **90**; (67 Ohio St.) **93**; (68 Ohio St.) **96**; (69 Ohio St.) **100**; (70 Ohio St.) **101**; (71 Ohio St.) **104**.

OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**; (36) **78**; (37) **82**; (38) **84**; (39) **87**; (40) **91**; (41) **93**; (42) **95**; (43) **99**; (44) **102**.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa. St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa. St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**; (195 Pa. St.) **78**; (196 Pa. St.) **79**; (197 Pa. St.) **80**; (198 Pa. St.) **82**; (199 Pa. St.) **85**; (195, 200 Pa. St.) **86**; (201 Pa. St.) **88**; (202 Pa. St.) **90**; (203, 204 Pa. St.) **93**; (205 Pa. St.) **97**; (206 Pa. St.) **98**; (207 Pa. St.) **99**; (208 Pa. St.) **101**; (209 Pa. St.) **103**; (210 Pa. St.) **105**.

RHODE ISLAND. — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**; (20) **78**; (21) **79**; (22) **84**; (23) **91**; (24) **96**; (25) **105**.

SOUTH CAROLINA. — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **58**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **68**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **76**; (58) **79**; (59) **82**; (60, 61) **85**; (62) **89**; (63) **90**; (64) **92**; (65) **95**; (66) **97**; (67) **100**; (68) **102**; (69) **104**.

SOUTH DAKOTA. — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**; (13) **79**; (14) **86**; (15) **91**; (16) **102**.

TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**; (107) **89**; (108) **91**; (109) **97**; (110) **100**; (111) **102**; (112) **105**.

TEXAS. — (68) **2**; (69; 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr.

Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**; (95) **93**; (41, 42, 43 Tex. Cr. Rep.) **96**; (96) **97**; (44 Tex. Cr. Rep.) **100**; (97) **104**.

UTAH.—(13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**; (23) **90**; (24) **91**; (25) **95**; (26) **99**; (27) **101**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**; (74) **93**; (75) **98**; (76) **104**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**; (100) **93**; (101) **99**; (102) **102**.

WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**; (26) **90**; (27) **91**; (28, 29) **92**; (30) **94**; (31) **96**; (32) **98**; (33) **99**; (34) **101**; (35) **102**; (36) **104**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **33**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**; (51) **90**; (52) **94**; (53) **97**; (54) **102**; (55) **104**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**; (113) **90**; (114) **91**; (115) **95**; (116) **96**; (117) **98**; (118) **99**; (119) **100**; (120) **102**; (121) **105**.

WYOMING. — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**; (8) **80**; (9) **87**; (10) **98**; (11) **100**.

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AMERICAN STATE REPORTS.

VOLUME 105.

(19)

CASES

IN THE

SUPREME COURT

OF

ARKANSAS.

COX v. STATE.

[72 Ark. 94, 78 S. W. 756.]

PUBLIC OFFICERS, Power to Appoint is not Necessarily Executive.—The general power to appoint officers is not inherent in the executive, nor in any other branch of the government. (p. 18.)

PUBLIC OFFICERS, Power in the Legislature to Appoint.—The legislature has power to make appointments to office, unless its powers are restricted by the constitution expressly or by implication. (p. 18.)

PUBLIC OFFICERS, Power to Appoint, When not Conferred on the Governor by the Constitution.—Provisions in the constitution of a state declaring that when any office becomes vacant, and no mode is provided by the constitution for filling the vacancy, the governor shall have the power to fill the same by granting a commission which shall expire when the person elected to fill the office at the next general election shall qualify, and that the governor shall, in case a vacancy occurs in any state, district, county, or township office, either by death, resignation, or otherwise, fill the same by appointment to be in force until the next general election, relate solely to elective offices, the incumbents of which are selected at regular intervals, and do not authorize the governor to appoint officers created by laws which provide for their selection by the legislature. (p. 20.)

CONSTITUTIONAL LAW—Public Officers, Appointment or Selection of, by the Legislature.—A statute providing for state capitol commissioners, and that they shall be elected by the two Houses of the legislature is not unconstitutional, on the ground that the constitution does not permit of the appointment or selection of public officers by the legislature. (p. 21.)

Quo warranto by the attorney general against the commissioners of the state capitol appointed by the governor. Judgment against the defendant commissioners, from which they appealed.

Charles Jacobson, for the appellants.

George W. Murphy, attorney general, John M. Rose and Charles T. Coleman, for the appellee.

[97] RIDDICK, J. This is an action brought by the attorney general against Thomas Cox and four other defendants, who were appointed by the governor to serve as members of the board of state capitol commissioners created by act of the last legislature. The act in question provided that the members should be elected by the two Houses of the legislature in joint session: Acts 1903, p. 249. In pursuance of this provision of the act, commissioners were duly elected by the legislature. But the governor, acting on the theory that the legislature had no power to make such selection, and that the power to appoint the members of the board was vested in him, appointed the five defendants to serve in that capacity, and this action was brought to test the validity of the appointments made by the governor. All parties wish to have the matter determined, and no objection is made to the form of the action or to the proceeding adopted, and we will proceed to consider the questions presented.

First, as to the power of the legislature to make appointments to office: In the United States the general power to appoint officers is not inherent in the executive or in any other branch of the government. It is a prerogative of the people, to be exercised by them or that department of the state to which it has been confided by the constitution. The legislature has, we think, power to make appointments to office unless its powers in that respect are restricted by the constitution, either expressly [98] or by implication: Hovey v. State, 119 Ind. 386, 21 N. E. 890; People v. Hurlbut, 24 Mich. 64, 9 Am. Rep. 103; State v. George, 22 Or. 142, 29 Am. St. Rep. 586, 29 Pac. 356, 16 L. R. A. 737; People v. Freeman, 80 Cal. 233, 13 Am. St. Rep. 122, 22 Pac. 173, and extended and full discussion found in note; Cooley's Constitutional Limitations, 6th ed., 104-133; 23 Am. & Eng. Ency. of Law, 2d ed., 340.

Now, an examination of our constitution will show that it not only contains no general or express prohibition against the exercise of the appointing power by the legislature, but it affirmatively shows that it was the intention of the framers of the constitution to permit the legislature to exercise such power to a limited extent. This is shown by the provision to the effect that if in an election for governor, Secretary of State,

treasurer, auditor or attorney general, two or more candidates for either of said offices shall receive an equal number of votes, then one of those persons receiving the highest votes "shall be chosen by the joint vote of both Houses of the General Assembly": Const. 1874, art. 6, sec. 3. It is shown also by the section which declares that "whenever an officer, civil or military, shall be appointed by the joint or concurrent vote of both Houses, or by the separate vote of either House of the General Assembly, the vote shall be taken viva voce, and entered on the journals": Const. 1874, art. 5, sec. 14. The contention that this section refers only to the officers of the General Assembly, such as clerks, pages and others necessary to discharge of the duties of that body, does not seem to be borne out by the language used. Why should it speak of the appointment of officers, "civil or military," if that was the meaning? We do not recall any military officer attached to the legislature, or to either of its branches, and we think that the language used is too broad to justify the construction contended for. It is, of course, not usual to have vacancies in office filled by appointment made by the General Assembly, and under our constitution there are many offices which could not be filled in that way. But, though not the usual method, the language of the constitution above quoted shows that the framers of that instrument intended that it might be done in some cases not otherwise provided for, and this is not the only instance in which such power has been exercised by the legislature. It is well known that the last legislature made provision for digesting the statutes of the 90 state, and appointed both a digester and an examiner to do the work required. The act by which these appointments were made by the legislature was approved by the governor, who thus inferentially approved the contention that the legislature has in some cases power to make appointments, and that a statute which attempts to confer this power is not necessarily unconstitutional and void on that account: Acts 1903, p. 414. We are, then, of the opinion from the language of the constitution itself that the legislature may to some extent, in cases not otherwise provided for, exercise the appointing power. It is also plain, we think, that the governor has no inherent power, by virtue of his position as chief executive of the state, to make these appointments. If he has such power, it must be because the constitution has conferred it upon him, and thus, inferentially at least, forbidden the legislature to make them.

The next question, then, is whether the power to appoint commissioners to serve on a board such as the one created by this act has been conferred upon the governor by the constitution in such a way as to prohibit the legislature from making the appointments. There are only two sections of the constitution quoted by counsel for appellants as conferring this power upon the governor. One of these is as follows: "When any office, from any cause, may become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have the power to fill the same by granting a commission, which shall expire when the person elected to fill said office at the next general election shall be duly qualified": Const. 1874, art. 6, sec. 23. The other section quoted is one of the amendments to the constitution, and is in the following language, to wit: "The governor shall, in case a vacancy occurs in any state, district, county or township office in the state, either by death, resignation or otherwise, fill the same by appointment, to be in force until the next general election." Both of these provisions, by their terms, plainly refer to elective offices—to those state, county, township and other offices the incumbents of which are selected by election at regular intervals. This is shown by the fact that each of those sections limits the term of the appointee of the governor appointed under them to the time when the person elected to the office at the next general election shall qualify and [100] assume the duties of the office, thus making it plain that they refer to elective offices. Neither of these sections, we think, has reference to commissioners such as the members of the state capitol board; a board created for a special purpose, the members of which are not elective, and whose terms and offices will both expire with the completion of the work for which the board was created. If no mode for the selection of this board had been provided, it may be that the governor would have had the power to make the appointments, but we need not concern ourselves with that matter here, for in this case the statute expressly points out the method by which these commissioners shall be selected.

We do not think it necessary to undertake to define very precisely what is meant by the term "public officer," as counsel has invited us to do, for, whether the members of this board can be said to be public officers or not, it is certain that, though the duties devolving upon them are of great importance, the positions they hold are of such a peculiar and limited kind that

they do not come within the provisions in reference to the regular officers of the state found in the constitution. As we see it, there is nothing in the constitution which forbids that the members of such a board shall be selected by the legislature. The method of selecting the members of such boards is a matter to be determined by the legislature, which can leave it to the governor to make the appointments, or can, if deemed safe, make them itself.

We are therefore of the opinion that the legislature had the right to provide for the selection of the state capitol board in the way pointed out by this act, and that the appointment by the governor of these defendants to serve as members of that board was without any authority in law to support it, and conferred no power whatever upon them to act as such board.

The judgment of the circuit court was, in our opinion, right, and it is therefore affirmed.

The Power of Appointment to Public Office is discussed in the monographic note to People v. Freeman, 13 Am. St. Rep. 125-147. This power does not necessarily belong to either the legislative, executive or judicial departments of the government: Fox v. McDonald, 101 Ala. 51, 46 Am. St. Rep. 98. That it may in some instances be exercised by the legislature, see State v. George, 22 Or. 142, 29 Am. St. Rep. 506; People v. Freeman, 80 Cal. 233, 13 Am. St. Rep. 122. Compare State v. Washburn, 167 Mo. 680, 90 Am. St. Rep. 430, and see the cases cited in the cross-reference note thereto. Consult, also, Board of Supervisors v. Todd, 97 Md. 247, 99 Am. St. Rep. 438.

DEUTSCH v. DUNHAM.

[72 Ark. 141, 78 S. W. 767.]

SALE OF CHATTELS, Right to Inspect.—Where a contract of sale is executory, the purchaser cannot be compelled to accept the property until he has had an opportunity to inspect it and ascertain whether it is such as is stipulated for. (p. 23.)

SALE OF CHATTELS, Inspection, When Necessary to Complete.—Where a contract is for the sale and purchase of lumber of different specified grades, an inspection is necessary to ascertain what are the grades of lumber which have been manufactured. (p. 24.)

SALES, Title, When does not Pass by.—Under a contract for the sale and purchase of lumber of different grades to be thereafter manufactured, title does not pass to the purchaser in advance of the actual or constructive delivery of the property to him, and where the seller refuses to abide by the purchaser's inspection, the only remedy of the purchaser for the refusal to deliver is by an action for damages. (p. 24.)

McCulloch & McCulloch, for the appellant.

H. F. Roleson and N. W. Norton, for the appellees.

[142] BATTLE, J. Albert Deutsch commenced an action of replevin against Dunham & Nelson to recover the possession of certain oak and gum lumber described in his complaint. The defendants denied that he was the owner or entitled to the possession of the lumber. The issues were tried by a jury, and a verdict was rendered for the defendants, and the plaintiff appealed.

The oak lumber was claimed by appellant under a written contract between him and appellees, dated March 27, 1899, which is as follows: "This is to witness a contract this day entered into by and between Albert Deutsch, party of the first part, and J. P. Dunham and D. L. Nelson, parties of the second part, in consideration of [143] six hundred dollars in cash paid to them by said A. Deutsch, the receipt of which is evidenced by a note for like amount, secured by a mortgage on the mill bought by said Dunham & Nelson and known as the Nash Mill, and other considerations hereinafter named, do sell to said A. Deutsch all the output and cut of red oak, white oak and ash lumber sawed by their said mill on the Choctaw and Memphis Railroad in St. Francis county, Arkansas, and in case of change of ownership of the mill this contract shall remain binding on the purchaser. The said lumber to be sawed by said Dunham and Nelson according to the orders of said A. Deutsch, to be piled at the siding of the Choctaw and Memphis Railroad in a good and workmanlike manner and properly crossed, using proper foundations and dry piling strips, giving plenty of ventilation and loaded on cars according to the wishes of said A. Deutsch whenever desired by him. Following are the prices agreed on between the parties of the first and second parts, to wit: [Here follows list of prices for different kind and grades of lumber.] The plain white oak and ash to be sawed as much as possible two and one-half inches and over thick as possible without disadvantage, and it shall be optional with party of the second part whether the culls shall be included or not, the lumber to be inspected green and paid for once a month less the usual two per cent for cash."

The prices agreed upon in the written contract were to be paid for sixteen different kinds and grades of lumber. The six hundred dollars were loaned by appellant to appellees to purchase the mill mentioned in the contract, and have been returned to him.

Evidence tending to prove substantially the following facts was adduced: Two men were sent by appellant, at different times, to appellees' mill to examine lumber sawed by them. George Lorraine was first sent to examine gum lumber. The lumber was not piled. He estimated the amount, and refused to include in his estimate certain "culls." Appellees objected, and refused to accept his inspection, and declined to deliver the lumber to appellant. Albert Lorraine was the other man. The lumber examined by him was not in piles, but in stocks. He estimated the quality of lumber sawed. He says that there was no way to determine from his estimate the value of the lumber. Appellees objected to his examination of the lumber, and refused to accept it [144] and to deliver the lumber to appellant, but sold it to other persons. The parties failed to agree upon inspection, and no satisfactory inspection was made. Appellant offered to send other inspectors, but all his offers were declined. He agreed that appellees might sell the gum lumber to other persons, and they did so.

His contention is stated in his brief as follows: "That as soon as the lumber was sawed and delivered at the place of delivery stipulated in the contract, and appellant had offered to inspect and pay for same, the sale was complete, and the contract was no longer executory, but executed, and that the title had passed to appellant, so that he could sue for possession." Is this contention correct in this case?

The contract upon which appellant bases his claim to the lumber in controversy was executory. At the time it was entered into, the lumber was not in existence. It was thereafter to be sawed by appellees, according to the orders of appellant, and to be well piled at the siding of the Choctaw and Memphis Railroad in a good and workmanlike manner. The prices to be paid were agreed upon and fixed according to grade of lumber. It was "to be inspected green and paid for once a month, less the usual two per cent for cash."

The contract being executory, it is clear that appellant could not be compelled to accept the lumber until he had an opportunity to inspect it in order to ascertain whether it was such as appellees stipulated to saw: 2 Mechem on Sales, secs. 1210, 1211, 1375, and cases cited. It is equally clear that the inspection was necessary in this case to ascertain the grades of the lumber, in order to determine the amount to be paid according to the stipulated prices. Both parties were interested in, and protected by, the stipulation that an inspection should be

made. Hence it was required, and, on account of the purposes for which it was evidently to be made, became a condition to be performed before the title to the lumber vested in appellant, and a complete sale to him was made. For it is not reasonable to suppose that the appellant intended to bind himself to receive and pay for all the lumber that appellees might manufacture. It was stipulated in the contract that the lumber he agreed to purchase should be sawed according to his orders. And it is not reasonable to presume that appellees intended to deliver the lumber before it was graded according to the prices agreed [145] upon and the amount to be paid therefor should be ascertained and fixed, and thereby subject themselves to the risk of loss, disagreements, and litigation that might follow.

There was no delivery of the lumber to appellant, actual or constructive. The transfer of the title to the property depended upon the intention of the parties. There was evidence adduced tending to prove that the title to the lumber should vest in appellant, and that it was not appropriated to the contract. Appellees refused to abide or accept the inspection of appellant's employés. Under all these circumstances, appellant was not entitled to maintain his action of replevin. His remedy, if any, was an action on the breach of contract for damages.

Affirmed.

If Goods to be Manufactured do not when made conform in quantity and quality with the specifications of the order for them, the title thereto does not pass to the purchaser until his acceptance of them: Johnson v. Hibbard, 29 Or. 184, 54 Am. St. Rep. 787; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154. As to the right of a purchaser to inspect the goods before accepting them, see Pierson v. Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831; Kuppenheimer v. Wertheimer, 107 Mich. 77, 61 Am. St. Rep. 317; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895.

KIRKLAND v. STATE.

[72 Ark. 171, 78 S. W. 770.]

TRIAL BY JURY, When not Provided for.—A statute authorizing the search for, and seizure and destruction of, intoxicating liquors kept for sale in a prohibited district, and that any person on whose premises or in whose custody any such liquor shall be found is entitled to his day in court, and after notice of the charge, to an opportunity to present his defense and meet witnesses, and the benefit of the legal presumption of innocence, a jury not being mentioned, does not provide for, nor require, a jury trial. (p. 29.)

JURY TRIAL, Right of, When not Guaranteed by the Constitution.—The provisions of the constitution that the right to trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty, or property without due process of law, do not guarantee the right to trial by jury except in cases which were so triable at the common law and such as are of similar or analogous nature. (p. 29.)

JURY TRIALS are not Necessary in Summary Proceedings, unless the statute so provides. (p. 30.)

JURY TRIALS may be Dispensed with in Proceedings in the Nature of Summary Abatements of Public Nuisances, as, for instance, in proceedings for the seizure and destruction of intoxicating liquors kept in a prohibited district, to be sold contrary to law. (p. 30.)

CRIMINAL PROCEEDINGS, What are not.—A proceeding for the search for and seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law is a civil and not a criminal proceeding, and the preponderance of evidence is sufficient to sustain it. (p. 31.)

J. W. and J. M. Stayton, Stuckey & Stuckey, Gustave Jones and Joseph W. Phillips, for the appellants.

George W. Murphy, attorney general, W. V. Tompkins, G. A. Hillhouse and S. D. Campbell, prosecuting attorney for this circuit, for the appellee.

173 BATTLE, J. A proceeding was instituted under an act entitled, "An act to suppress the illegal sale of liquor and to destroy the same when found in prohibited districts," approved February 13, 1899, section 1 of which, so far as it is necessary to set it out in this opinion, is as follows: "It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous, ardent, vinous, malt or fermented liquors, or any compound

or preparation thereof commonly called tonics, bitters or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a warrant, directed to some peace officer, directing in such warrant a search for such intoxicating liquors, specifying in such warrant the place to be searched, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs or kegs containing such liquors; . . . . provided, that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed."

174 The proceeding was commenced as follows: On the 22d of March, 1901, J. E. Wilmans made an affidavit, before the clerk of the Jackson circuit court, that certain liquors were then kept in a building, No. 500 East First street, in the city of Newport, to be sold contrary to law, and the building was then used and controlled by C. C. Kirkland and Ol Kirkland, and was in a prohibited district, and asked that the liquors be seized and destroyed according to law.

On the 23d of March, 1901, the prosecuting attorney filed an information, based upon this affidavit, and prayed for a warrant, commanding the seizure of the liquors, and for their condemnation. A warrant for the seizure of the liquors, and a summons, commanding the Kirklands to appear and show cause why the same should not be publicly destroyed, were issued. The warrant was executed.

On the 12th of July, 1901, at the term of the Jackson circuit court next ensuing, C. C. and Ol Kirkland filed their answer, denying that the liquor was kept in the district to be illegally sold, and alleging that it was the property of the Kirkland Liquor Company, a firm composed of C. C. Kirkland, M. E. Kirkland and H. O. Snyder, and that D. O. Kirkland was their manager.

On the same day the Kirkland Liquor Company filed a claim for the liquor, in which they denied that it was kept in the prohibited district for illegal purposes, and alleged that they had been engaged in the retail liquor business in Newport during the year 1900, and, on failure to procure license, they transferred their business to Bald Knob, in White county, Arkansas, where they were licensed retail liquor dealers; that just before

their removal the business portion of Bald Knob was destroyed by fire, and they were unable to procure a place to store their stock of liquor, but only such as was needed for immediate use, and they kept a part of it stored in the room formerly occupied by them as a saloon, and, having had the premises leased for a term of years, they used the room (No. 500) as a warehouse, until they could store it at Bald Knob.

On the 15th of July the state filed an amendment to its complaint, in which it alleged at the time of the seizure of the liquor in controversy, and prior and subsequent thereto, liquor was illegally sold in and on premises No. 504 East First street, and [175] said illegal business was conducted in the name of R. T. Simmons, as to the general public, under a license issued by the United States to J. O. Jameson & Co.; that premises No. 504 was a part of the same building in which was also No. 500, and was connected therewith, and that the whole of such premises was, at the time of the seizure, under the control of D. O. Kirkland, the manager of claimants; that the liquor in No. 500 was used in connection with the business in No. 504, and in collusion with Simmons, and with the knowledge, consent, connivance and procurement of Kirkland and claimants; and prayed as before.

Appellants and D. O. Kirkland answered, and denied all the allegations in the amendment. A jury was impaneled to try the issues of fact in the case. The court and jury heard the evidence adduced by both parties. At the close of it the court ordered the jury to return a verdict in favor of the state, as follows: "We, the jury, find that the liquor seized under the said warrant, and in controversy in this case, were kept in a prohibited district to be sold contrary to law, and find for the plaintiff"; and they did so. Thereupon the court rendered judgment in accordance therewith, and ordered the sheriff to publicly destroy the liquors; and the claimants appealed.

Appellants contend that issues in proceedings under the act of February 13, 1899, must be tried by a jury, and that the rule in criminal cases must be applied, and it must be proved beyond a reasonable doubt that the liquors are or were kept in or shipped into a prohibited district, to be sold contrary to law; and that by the action of the court they were deprived of both these rights. Were they entitled to a jury?

The act of February 13, 1899, in every respect, treats, and virtually and in effect declares, the keeping and shipping intoxicating liquors in and into a prohibited district, to be sold con-

trary to law, to be a public nuisance. It does not provide that a regular action or suit shall be instituted for the enforcement of its object. No complaint or writing of any kind need be filed, according to its terms. The warrant may be issued upon knowledge or reasonable belief, and by the judges of many courts of different jurisdiction and procedure. The sittings of three of them, justices of the peace, [176] mayors and police judges, are frequent and at no stated times fixed by the statutes. One class of them, chancellors, are judges of courts of equity, in which issues of fact in proceedings to abate a nuisance, and in controversies of an equitable nature, can be tried by the chancellor without a jury, indicating thereby that juries are not required, for why should they not be required in one case, and made necessary in all others? Indeed, the act does not, unless it be inferentially, provide for a trial in any court. Without expressly vesting jurisdiction in any, it authorizes chancellors, circuit judges, justices of the peace, mayors and police judges to issue the warrant. In fact, the whole act indicates that the legislature intended that the nuisance should be speedily abated by summary process. Section 3 of the act strengthens this conclusion, and is as follows: "That if any suit shall be brought against any officer or his bondsmen, or any other person, to recover for any liquors, vessels, barrels, bottles, jugs or kegs destroyed under the provisions of this act, it shall be a complete defense to such suit for such officer, bondsman or other person to show to the satisfaction of the court or jury that such liquors so destroyed were being sold contrary to law, or were kept to be sold contrary to law, or had been shipped into any prohibited district to be sold contrary to law, or that any portion of the liquors so destroyed had been a part of any liquor so sold contrary to law, or kept to be sold contrary to law, and, upon such showing being made, such officer, bondsman or other person shall not be liable for the liquor, vessels, barrels, bottles, jugs or kegs so destroyed": Acts 1899, p. 12.

The proceedings prescribed by the act are, a warrant, directed to some peace officer, directing a search for the liquors, specifying the place to be searched, "and directing such officer on finding liquor kept for sale in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs or kegs containing such liquors; the seizure of the liquors; and return of the warrant." In addition to this, it further provides "that any person on whose premises or in whose

custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed." In Ferguson v. Josey, 70 Ark. 94, 98, 66 S. W. 345, 346, the court, in construing this proviso, said: "This clearly means that the owner of such liquor [177] shall be entitled to a fair and legal trial, with all the usual incidents thereto, for the purpose of ascertaining and determining whether his property has been forfeited, before it shall be destroyed; that he, or his agent in legal custody, shall have notice of the charge of the guilty purpose upon which his property is declared to be unlawfully held, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence." The latter clause of the sentence quoted enumerates usual incidents of a fair and legal trial. A jury is not mentioned, and it is not necessary to constitute a fair and legal trial. In no case is a trial by jury expressly or impliedly required, or necessary to a full and complete enforcement of the act.

But appellants contend that a trial by jury is a right guaranteed by the constitution, and that it was not within the power of the legislature to deprive them of it in this case. It is true that the constitution provides that "the right of trial by jury shall remain inviolate" (article 2, section 7); and that no person shall "be deprived of life, liberty or property, without due process of law" (article 2, section 8). But it is well settled that it is only to cases at common law in which the issues of fact were triable by jury, and perhaps such as are of similar or analogous nature, that the guaranty relied upon by the appellants extends. A jury trial is not necessary to constitute due process of law in every case: Govan v. Jackson, 32 Ark. 553; Williams v. Citizens, 40 Ark. 290.

Parties in the following cases and proceedings are not entitled to a trial by jury: Proceedings for contempt (Neel v. State, 9 Ark. 259, 50 Am. Dec. 209); contested elections (Govan v. Jackson, 32 Ark. 553); actions for the possession of an office under the code (Wheat v. Smith, 50 Ark. 266, 7 S. W. 161); exceptions to an account of a guardian in probate court (Crow v. Reed, 38 Ark. 482); proceedings to disbar an attorney (Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27 L. ed. 552); proceedings to condemn land for right of way for railroads under the constitution of 1836, which did not provide for trial by jury in such cases (Cairo etc. R. R. Co.

v. Trout, 32 Ark. 17); suits in equity to abate a public nuisance (Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; Eilenbecker v. District, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33 L. ed. 801; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641); other suits of an equitable nature (Hinkle v. Hinkle, 55 Ark. 583, 18 S. W. 1049); and other cases.

178 Vagrants and drunkards "may be lawfully detained and deprived of liberty without a jury. Such has been a lawful procedure in cases time out of mind under the common law". Brannon on the Fourteenth Amendment, 309. Taxes can be imposed, and property may be seized and sold for the purpose of collecting it, without suit, action or jury trial: Cooley's Constitutional Limitations, 6th ed., p. 587. "A municipal corporation may summarily, without suit or warrant, in some cases, if not all, remove a public nuisance, without jury trial or legal proceeding other than the order of its council": Gaines v. Waters, 64 Ark. 609, 44 S. W. 353; Waters v. Townsend, 65 Ark. 613, 47 S. W. 1054.

Jury trials are not necessary in summary proceedings, unless the statute requires it: 4 Blackstone's Commentaries, 280; 24 Am. & Eng. Ency. of Law, 1st ed., 498; Chambers v. Stringer, 62 Ala. 596; Francis v. Weaver, 76 Md. 457, 25 Atl. 413. In Govan v. Jackson, 32 Ark. 553, it was held that "it is competent for the legislature to dispense with a jury in the case of a contested election; and a provision for the trial of such cases in a summary way has that effect."

We therefore conclude that it was within the power of the legislature to dispense with a jury trial in the summary abatements of public nuisances, and it has done so in this case.

Appellants contend that the proceedings prescribed by the act of February 13, 1899, are of a criminal nature, and that the allegation that the liquors in controversy were kept in a prohibited district to be sold contrary to law must be proved beyond a reasonable doubt. Are they criminal proceedings?

A similar question was discussed and decided in State v. Barrels of Liquor, 47 N. H. 374. In that case the court said: "This is a proceeding in rem, for the condemnation of the liquor and vessels; no penalty or fine is to be imposed upon the person who keeps the liquor with intent to sell, under this proceeding. All that is done, or that can be done, under this complaint, is to settle the question whether the liquor, vessels, etc., shall be condemned as forfeited to the county, or shall be de-

livered to the claimants, or restored to the place from whence they were taken. It is a proceeding that cannot be commenced by indictment, and the complaint which is made in the first instance is in the nature of a libel, ... and not in the nature [172] of a criminal complaint against any person, but is simply a proceeding in rem against the liquor, etc., for their condemnation as forfeited property. . . . . This class of cases are [is] to be considered and tried as civil cases are tried. The question involved is only as to the title to property, like other questions in civil causes. It is only when some crime or misdemeanor is charged upon an individual that all reasonable doubt of the guilt of the accused must be removed. But here no one is accused of any crime; in fact, it is not a proceeding against any person. . . . . All issues will be decided upon the preponderance of evidence."

Chief Justice Marshall, in "a trial of an information to declare the forfeiture of a ship for having exported arms and ammunition in contravention of law," said: "We are unanimously of the opinion that it is a civil cause. It is a process in the nature of a libel in rem; it does not, in any degree, touch the person of the offender": United States v. La Vengeance, 3 Dall. 297, 1 L. ed. 610.

In a case declaring the forfeiture of gunpowder for having been kept in violation of law, Chief Justice Shaw, speaking for the court, said: "The court are of opinion that a libel, sued as a process in rem for a forfeiture, is in the nature of a civil action, and that either party may file exceptions in matter of law": Barnacoat v. Six Quarter Casks of Gunpowder, 1 Met. (Mass.) 230.

Mr. Justice Story said: "It is not true that informations in rem are criminal proceedings. On the contrary it has been solemnly adjudged that they are civil proceedings": Anonymous Case, 1 Gall. 23, Fed. Cas. No. 444.

Mr. Waples, in his work on "Proceedings in Rem," says: "Admiralty causes against vessels or goods for forfeiture, revenue cases, and all species of proceedings in rem against things guilty, hostile or indebted, are well settled to be civil, and not, in any sense, criminal actions": Sec. 25, and cases cited.

So we think that the proceeding prescribed by the act of February 13, 1899, is civil, and that a preponderance of the evidence is sufficient to sustain it.

The evidence in this case is sufficient to sustain the finding of the court and the verdict of the jury.

Judgment affirmed.

A Constitutional Guaranty of the right to trial by jury guarantees the right only as it existed at the time when the constitution was adopted: Hathorne v. Panama Park Co., 44 Fla. 194, 103 Am. St. Rep. 138, and cases cited in the cross-reference note thereto. In summary proceedings to abate a nuisance (Ex parte Keeler, 45 S. C. 537, 55 Am. St. Rep. 785), or to destroy gambling apparatus (Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352), the defendant has no constitutional right to a jury trial.

KINDLEY v. SPRAKER.

[72 Ark. 228, 79 S. W. 766.]

HOMESTEAD.—A Conveyance of a Homestead by a Husband to His Wife need not be joined in nor executed by her. (pp. 32, 33.)

Action to recover an interest claimed by the plaintiff as granddaughter and heir at law of W. W. Spraker in certain real property which he, holding as a homestead, conveyed to his wife, Isadore Spraker, she not joining in the deed. It was also alleged that the conveyance was without consideration, and that the plaintiff was the holder of a promissory note executed by said W. W. Spraker. A demurrer to the complaint being sustained, the cause was dismissed, and the plaintiff appealed.

C. M. Rice, for the appellant.

McGill & Lindsey, for the appellee.

229 HUGHES, J. W. W. Spraker, a married man and the head of a family, owning a tract of land, conveyed the same to Isadore Spraker, his wife, who did not join in the conveyance as required generally by the statute, which provides (Act March 18, 1887) that "no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' lien, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same." Was the conveyance valid? We think that the conveyance by the husband directly to the wife, which meets her approval, shows her con-

sent to it, and meets the intent of the act to the same extent as a conveyance by the husband to a third person in which the wife [230] joins. It seems that it would be unreasonable to believe that the legislature, in passing this act, intended that it should be applied to a conveyance by the husband of a homestead to the wife. In the case of Park v. Park, 71 Ark. 283, 72 S. W. 993, this court said: "The evident purpose of this statute was to protect the interest of the wife in the homestead by forbidding the husband either to sell or encumber it without her joining in the deed"; and "it is clear, we think, that the husband cannot make any conveyance of his homestead affecting the interest of his wife therein without her consent, for purposes other than those named in the statute." The statute requiring a wife to join with her husband in the deed of the homestead does not prevent his conveying his interest therein to her: Lynch v. Doran, 95 Mich. 395, 54 N. W. 882. "To require a deed from herself to herself would be senseless": Stevens v. Castel, 63 Mich. 111, 29 N. W. 828. Thompson on Homesteads and Exemptions, section 473, says: "The policy of these statutes, which restrain the alienation of the homestead without the wife joining in the deed, is to protect the wife and enable her to protect the family in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance": Turner v. Bernheimer, 95 Ala. 241, 36 Am. St. Rep. 207, 10 South. 750. The weight of authority sustains this view.

The judgment of the court is sustained and affirmed.

The Principal Case is supported by perhaps the weight of authority. The law upon this question, however, is not entirely settled: See the monographic note to Jerdee v. Furbush, 95 Am. St. Rep. 923-926; Robertson v. Tippie, 209 Ill. 38, 101 Am. St. Rep. 217.

HUNT v. STATE.

[72 Ark. 241, 79 S. W. 769.]

HUSBAND AND WIFE, Larceny by Him of Her Property.—At the Common Law a husband could not be found guilty of larceny in respect to his wife's personal property, because, on their marriage, it became his. (p. 37.)

HUSBAND AND WIFE, Larceny by Him of Her Property.— Under a constitutional provision to the effect that all property of any feme covert in this state acquired before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, a husband may be guilty of larceny of his wife's personal property. (p. 41.)

LARCENY, Variance, When does not Exist.—Under an indictment for larceny by a husband in stealing money for his wife, proof that he obtained such money by means of a check drawn by her does not constitute a variance, where such check was given him to purchase an interest in certain property, not for himself, but for her. (p. 41.)

LARCENY AND EMBEZZLEMENT.—Where a Husband Forms an Intent to Appropriate Money of His Wife to his own use, and for that purpose obtains a check from her with the professed object of buying property for her, and then, in pursuance of his real and original purpose, appropriates such money to his own use, he is guilty of larceny and not of embezzlement. (p. 41.)

STATUTES, When Become Laws Without the Governor's Approval, Though They do not Remain in his Hands the Time Prescribed by the Constitution.—The five days' time allowed the governor for the consideration of bills presented to him for approval or disapproval is a matter of privilege with him which he may waive by notifying the proper House that the bill may become a law without his approval. (p. 41.)

Gus Fulk, for the appellant.

George W. Murphy, attorney general, for the appellee.

242 BUNN, C. J. This is an indictment for the larceny of the money of his wife by the defendant, with a count for obtaining money under false pretenses, which last, however, was not considered in the trial.

The circumstances of obtaining the wife's money were of the most aggravating character. The wife before their marriage was Miss Maud Nevills, a young woman who had earned the amount of six hundred dollars as a saleswoman in one of the leading drygoods stores in Little Rock, and deposited the same in the German National Bank of this city. The defendant had ascertained this fact in some way and from some source, and paid his addresses to her, and on the 6th of October, 1902, they were married in this city by the pastor of one of its leading

churches. It seems that he almost immediately set to work to get hold of this money of his wife, and by one promise and representation and another, mainly to the effect that he would purchase certain business property, or a share in it, with the money thus obtained for her benefit. Being importuned in this way—yielding, doubtless, much to her wifely feelings—she gave him a check for said amount on the German bank, signing her marital name, Maud Hunt, thereto. On being presented in this shape, the German bank officials declined to pay it. The defendant then induced her to sign her maiden name, Maud Nevills, to the check—the name on the bank books—and in this shape presented it, and it was paid. This was late in the afternoon of the 14th of October, 1902, and the defendant, on one of the trains in the evening of the same day, in company with another woman, left the city, and the two were [243] next heard of in the city of Los Angeles, California, a few days afterward. The constable of Big Rock township, in which the city of Little Rock is situated, hearing of the defendant's whereabouts, telegraphed to the chief of police of Los Angeles, giving a description of the defendant, with his name, and an alias, requesting that he be arrested and held until he himself could reach that city from Little Rock. The defendant was taken in charge by the constable on his arrival in Los Angeles, accordingly, and brought back to Little Rock, where one or more indictments were lodged against him in the first division of the circuit court of Pulaski county. The other woman, Bird Sheppard, who went with the defendant to Los Angeles, was in that city when the defendant was taken in charge there by the constable from Little Rock, but was not permitted to board the same train with the defendant on his return in charge of the constable, but succeeded in doing so at El Paso, Texas, en route, disembarking from another eastbound train at that place, and testified at the trial.

There was evidence in the case to the effect that the defendant had planned the marriage, etc., as part of the scheme to obtain the money some time before the marriage was consummated, and the circumstances justified the conclusion that the elopement was in fact a permanent desertion of the wife by the defendant. There was no controversy as to the manner of obtaining the money, nor as to the deposit of the same in the bank by the wife.

The defendant asked the trial court to give the following instructions, to wit:

"1. If you find from the evidence that the property alleged

to have been stolen was at the time the property of Maud Hunt, and that at the time Maud Hunt was the wife of this defendant, then you will find the defendant not guilty, because in this state the husband cannot be guilty of larceny of the property of his wife.

"2. If you find from the evidence that the wife of defendant, Maud Hunt, placed in the custody of defendant a check for six hundred dollars to be cashed by him, and the money invested in her name or for her use, and that defendant afterward cashed said check and converted the said money to his own use, you will find the defendant not guilty of larceny, because that would not be larceny, but embezzlement."

244 The court refused to give the first of said instructions, and modified the second one by adding: "But, on the other hand, if you believe from the testimony, beyond a reasonable doubt, that defendant, by fraudulent artifice, practiced upon prosecuting witness, Maud Hunt, did obtain from her a check for six hundred dollars, and drew the money on it, and thereby obtained and carried away her money, as alleged in the indictment, and had, at the time he so practiced said fraudulent artifices, and obtained and carried away said money, with the felonious intent to steal the same, you will find him guilty of grand larceny, as charged in the first count of the indictment."

The defendant excepted to the ruling of the court in refusing to give the first of these instructions, and in giving the second only as modified.

The defendant then asked a third instruction, as follows: "3. Defendant, J. F. Hunt, moves the court to instruct the jury to bring in a verdict for the defendant of not guilty, on the ground that there is a variance between the allegations of the indictment and the evidence, the indictment alleging the larceny of six hundred dollars, and the evidence showing the property taken to have been a check for six hundred dollars."

The court refused to give this instruction, to which ruling defendant at the time excepted, and exceptions were noted.

The defendant also excepted to the following charge of the court to the jury, to wit: "You are to exercise your judgment and common sense, neither of which you are to leave behind you when you go into the jury room. Under the laws of the state of Arkansas a married woman may own property absolutely in her own right. A husband in this state may steal the property of his wife. It is for you to determine from the testimony in this case and the law given you whether the defendant has stolen

the money as alleged in the indictment. If you find from the evidence beyond a reasonable doubt that he conceived the idea that he would steal the money, which he knew or believed the prosecuting witness had, and, for the purpose of enabling him to accomplish that object, he married her, and used artifices upon her, and thereby deceived her, inducing her to deliver to him the money, having all the time the intention of stealing it, the [245] marriage would be no protection to him, but would rather be an aggravation of the offense." The defendant excepted to the above remarks, and his exceptions thereto were noted.

From the foregoing abstract it readily appears that there are two main issues of law raised by the instructions, to wit, whether or not, in the present state of the law on the subject in this state, a husband can be found guilty and punished for the larceny of the wife's property; and whether, under the facts and circumstances of this case, the offense, if offense at all, is that of larceny or of embezzlement, getting money under false pretenses, or of some other of the phases of stealing.

Under the common law a husband could not be found guilty of larceny in respect to his wife's personal property, simply because on their marriage her personalty ipso facto became his property, and he could not be found guilty of the larceny of his own property. But of recent years, both in this country and in Great Britain, there has been a great enlargement of a married woman's property rights as against her husband, and in some instances an absolute separation of her rights from those of her husband. But the law on the subject may be yet regarded as in a state of transition from the old to the new principles, and for this reason precedents have not had time to have grown into such magnitude and volume as in most other changes from the common to the statute law rules.

As an illustration either of the extreme conservatism of the courts, or the defects of the statutes wherein they fall short of a complete revolution, we may take the case of Thomas v. Thomas, 51 Ill. 162, cited and much relied on by the appellant's counsel in this case. After some discussion of the question to the husband's larceny of the wife's property, the conclusion of that court was summed up in this statement: "The act of 1861 (Laws 1861, p. 143), known as the 'married woman's law,' has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other." The charge of larceny in that case was made against

the wife, who had deserted her husband, and carried with her a watch, or disposed of it so that it could not be found. "Whose watch?" said the court. "Was it her watch, or did it belong to someone [246] else? If it was her own, under the law of 1861, called the 'married woman's law,' she had a right to dispose of it without consent, or even the knowledge, of her husband. The law gives her that right, and if she exercises it, however injudiciously, there is no ground of legal complaint on the part of the husband. Again, if it belonged to the husband, it could not, even under that law, be held larceny. That act has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Whatever is the civil liability, if any, it is not larceny, and the evidence fails to show that the watch belonged to some other person."

We have not the Illinois married woman's act before us, and cannot therefore give any definite construction of its statute. We are still left to the inquiry whether or not that statute was so full and complete as to create an entire and absolute separation of a wife's property from the control and influence of the husband over her property. The court in that case said that the act was not so full and complete as to produce that result, leaving the inference that if such had been the case, then the husband, at least, might be held for the larceny of the wife's property. No statute has wrought any change in the common-law rule as to the wife's dealing with the husband's property, for she still has every interest in his property she ever had. The ordinary married woman's law, as found in the several legislative acts, may fall short of an entire and absolute separation, for these acts are generally specific. But while in this state the statute itself is not full and complete to work a revolution in the law on the subject, yet the constitutional provision on the subject is broad enough to cover any conceivable property right of the wife, and is expressed in this language, to wit: "The real and personal property of any feme covert in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a feme sole; and the same shall not be subject to the debts of her husband": Const. 1874, art. 9, sec. 7.

The sole question in the case of Kies v. Young, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669, was whether or not the common-law doctrine that a husband is [247] responsible for the

antenuptial debts of the wife was in force. The court in that case held that the common-law rule prevailed. The rule, however, was subsequently changed by act of the legislature, and the husband is not now responsible for the wife's antenuptial debts: Acts 1899, p. 4.

Had our constitutional provision been in the constitution or the married woman's law of Illinois, we cannot say how the supreme court of the state would have ruled on the subject; nor does it matter what the law of that state was on the subject, since we assume, for the sake of the argument, at least, that its supreme court properly considered it. It was a charge against the wife for the larceny of the husband's property, and the case is thus somewhat differentiated from the one at bar. The commission of the alleged larceny in that case was sought by the plaintiff husband to be made a ground of divorce from his wife; but upon consideration the court finally held, in effect, that whatever might be said on the question of law involved, there not having been any conviction of the wife for the larceny of the husband's property, the mere charge was no ground for divorce.

As has been intimated, the constitutions and statute laws of the American states have not gone so far as to make any radical changes as to the wife's relation to the husband's property from the rule of the common law, and these modern laws throw little light on the question of the criminal liability of the wife in her dealing with her husband's property.

In the state of Indiana, section 5117 of the Revised Statutes of 1881 is substantially like our constitutional provision, and the other portions of the married woman's law of that state is substantially like our married woman's law. In Beasley v. State, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35, the supreme court of that state held that "under the enabling statutes of this state the husband's interest in his wife's property is abolished, and he may be convicted of the larceny of her money." In its essential features that case was very much like the one at bar, and practically all the arguments made by counsel in this case were made in that. The court in that case, in concluding the discussion, said: "Prior to the enactment of the several sections of the statutes of this state, the common-law fiction prevailed of the legal unity of husband and wife. In the eye of the law they were one person, and the [248] husband was that person." Indeed, when thus left in sole ownership and management of her personal property, it would seem to follow

that the wife should have all the benefits and powers of the law both civil and criminal, to give her that protection to her property rights which belong in common to all property owners. She certainly has as against third parties; and with equal reason and necessity, if not greater reason, she should have as against her husband, who so far forgets his marital obligations, as well as the rights of property, as to steal from her, taking advantage of his better opportunity therefor. In the case of Beasley v. State, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35, just referred to, the court further said: "One who obtains money or goods by some fraudulent trick or artifice, and carries them away, is guilty of larceny." This was the manner in which the defendant obtained the money in this case. The evidence shows conclusively that it was a well-laid scheme on his part to procure the money even before they married—certainly before the delivery of the check to him by her. The beginning of the offense was the first conception of the design, the intent to steal the money, followed by the fraudulent artifices employed. The larceny of the money overshadowed and covered all the methods by which he sought to accomplish his purpose, and the intent was formed before he received the check, and the charge of larceny was properly made, tried and sustained by the evidence: Fulton v. State, 13 Ark. 168.

In State v. Jones, 132 N. C. 1043, 95 Am. St. Rep. 688, 43 S. E. 939, 61 L. R. A. 777, a case much more favorable to the defendant than the case at bar, because it was a charge of trespass against the husband for persisting in living in his wife's house after being forbidden to do so by her—the court held that, under the circumstances of the case, the charge could not be sustained, saying: "This case presents the novel feature of a wife seeking a judicial separation from her husband by the criminal action of trespass." In that case Chief Justice Clark delivered a dissenting opinion, which is most instructive and interesting for its research and reasoning on the subject.

The conclusion of the whole matter is that while modern civilization has greatly, if not entirely, relieved the personal unity of the husband and wife and the superior control of the husband of the disgraceful cruelty practiced in the early stages of the common law, yet the very letter of the law in that respect has [249] not undergone very marked changes, but, as to property rights, that unity has been destroyed, so far as affects the question at issue, by positive enactments in this state, and we are of the opinion that the learned circuit judge committed no error in his instructions to the jury on the subject.

The wife in this case gave the check to the defendant, and by that instrument he could readily have obtained the money it called for at the bank. It would be carrying technicality to a most dangerous extreme to hold that the proof of the mere instrumentalities of obtaining the money constituted a variance with the charge of obtaining the money itself, where the same evidence also showed the fact of obtaining the money itself. A check is a mere order for so much money, the credit of the drawer in the bank or drawee, which it is bound to honor when made in form and properly presented. The proof also showed the money was paid to the defendant.

The giving of the check by the wife to the husband and the committing of the money to be obtained thereon were merely temporary in their effect. The evidence shows that the check for the money was given by her to procure the money to purchase an interest in certain business property for her, not for himself, and thus the title in the money never passed out of the wife to the defendant, and the same continued to be her property, even when he was attempting to appropriate it to his own use and purposes. The evidence tends to show that the intent to obtain and appropriate the money was conceived from the beginning, even before the marriage, certainly before he obtained the check, and that by fraudulent artifice he inveigled her into giving him the check therefor as stated. This made the crime of larceny, and not embezzlement, as contended by appellant's counsel. The learned circuit court committed no error in its instructions to the jury in this respect.

It is objected that the act entitled "An act to authorize certain persons to testify in certain cases" (Acts 1903, p. 141) is invalid, for the reason that the bill for the act was never properly approved, and did not become a law. The journals show that it was presented to the governor on the 13th of March, and was returned by him to the Senate, in which it originated, on the 17th of March, making less than five days, Sundays excepted. The governor, however, on the last-named date, said this in his communication to the Senate: "Senate Bill No. 85, authorizing certain persons to testify in certain cases, became a law without my signature." The five days allowed the governor for the consideration of bills presented to him for approval or disapproval is a matter of privilege with him, until the same shall lapse, when the bills become laws. He can, of course, waive the time and notify the proper House that the bill may become a law without his signature, and that is what

he did in this case. The other objection to the law because of alleged irregularities in the entries to the journal during its passage shows mere clerical errors, if anything, it sufficiently appearing what was evidently the intention of the legislature in the entire course of procedure in reference thereto.

Judgment affirmed.

Larceny could not be committed at the common law by a husband in respect to his wife's property. The rule is otherwise, however, under the modern married women's statutes: See the monographic not to People v. Miller, 88 Am. St. Rep. 597.

Embezzlement is the subject of a monographic note to Eggleston v. State, 87 Am. St. Rep. 19-47.

VANCE v. NEWMAN.

[72 Ark. 359, 80 S. W. 574.]

SALE OR OPTION.—A bond reciting that C. and C. have bought certain described real property, and have paid a sum specified and are to make further payments of amounts and at dates specified therein, shows that the first payment is on the purchase price and not on an option. (p. 43.)

STATUTE OF FRAUDS.—The Signing of a Contract for the Sale and Purchase of Real Property by the Seller Only satisfies the statute of frauds, if the contract is accepted by the purchaser, and it cannot be avoided by the vendor for want of mutuality. (p. 43.)

TIME IS NOT OF THE ESSENCE of a Contract in Equity, and this is especially true of time specified for the payment of money. (p. 44.)

TIME OF PAYMENT, When not of the Essence of a Contract of Purchase.—Under a contract for the sale and purchase of land specifying several dates on which payments are to be made, it is not essential that such payments be made on the dates so named. (p. 44.)

SPECIFIC PERFORMANCE—Delay in Tendering Payment.—Where one-third of the purchase price of land has been paid, as stipulated in a contract of sale and purchase, a delay of twenty days after payment becomes due in tendering the amount required does not destroy the right to specific performance, though the value of the land has substantially increased in the meantime owing to the location of a railway. In such circumstances, if the seller wishes to rescind, he should give the purchaser notice that he will do so, unless payment is promptly made. (p. 44.)

SPECIFIC PERFORMANCE may be Decreed Against a Grantee of the vendor who purchases with full notice of the vendee's rights. (p. 45.)

VENDOR AND PURCHASER—Taxes, by Whom Should be Paid.—After the date of a contract for the sale and purchase of land, it is regarded in equity as belonging and taxable to the purchaser, and to entitle him to specific performance, he must tender to the vendor all subsequently accruing taxes paid by him. (p. 45.)

G. J. Crump, for the appellant.

J. W. Story, for the appellees.

[362] RIDDICK, J. This is an action for specific performance. The first question in the case is whether the bond for title set out in the statement of facts amounts to a contract for a sale of the land, or only an option giving the assignors of plaintiff the right to buy at the price named within the time specified in the contract. The bond recites that "T. R. Cave and E. L. Clendenin have purchased from the said Newmans lot No. 7, in block No. 4, in the old town of Harrison, Arkansas, and have paid thereon one hundred and fifty dollars, and are to make future payments [363] as follows: One hundred dollars on November 10, 1899; one hundred and twenty-five dollars on February 10, 1900, and one hundred and twenty-five dollars on August 10, 1900." There is nothing here to show that the one hundred and fifty dollars paid on the land was paid as an option. On the contrary, the language is that the parties have purchased the lot and paid thereon the sum named. This was, we think, a part payment on the purchase of the land, and there is nothing in the remainder of the contract to show that only an option was intended. The fact that one of the parties may have thought that the legal effect of this bond was only to give plaintiff an option to purchase within a year cannot alter the law or the bond, for he does not claim that he was led to adopt this view by fraud or representation of plaintiff.

Again, it is said that only the defendants signed the contract, and that its language shows that it was essential that the payment of the price should have been made within the time named in the contract. But the language of the contract shows that it was intended to be mutually binding on both parties. It recites the fact of the purchase, and that the vendees have paid a certain amount on the land, and that they are to make certain other payments. The only reason for saying that there was no mutuality in the contract is the fact that the contract was not signed by the assignors of plaintiff as well as by the defendants. With this exception the contract is complete in every respect, containing the names of the parties, a description of the property sold, and the price to be paid. After the contract was signed by defendants, it was accepted by the assignors of plaintiff, who thereupon paid nearly a third of the purchase price, thus making the land itself a sufficient security for the payment of the remainder due. Under these circumstances it is well

settled that the signing of the contract by the defendants takes the case out of the statute of frauds, at least so far as defendants are concerned, and that the contention that there is a want of mutuality in the contract sufficient to defeat the action cannot be sustained: Slater v. Smith, 117 Mass. 96; Pomeroy on Contracts, 2d ed., secs. 75, 170, and cases cited.

We see nothing in the language of the contract that shows that it was essential that the payment of the purchase price should be made on or before the dates named in the contract. As a rule, time is not ordinarily essential in equity, and this is specially [364] true, says Mr. Pomeroy, of promises to pay money. "A default in the payment at the day appointed, unless the delay be from such a cause or be continued so unreasonably long as to be ground for rescission, will always be relieved; in other words, the mere suffering the pay-day to pass will not preclude the party from enforcing the contract. The reason is that, by a payment of the principal and interest for the time which has elapsed, equity considers the creditor party as fully compensated": Pomeroy on Contracts, sec. 374; Dynan v. McCulloch, 46 N. J. Eq. 11, 18 Atl. 822.

But it is said that after the date when the price became due, and before plaintiff offered to pay, the value of the land had greatly increased, so that it would be inequitable to decree a specific performance under such circumstances. The purchase money became due on the tenth day of August, and was tendered in full with interest on the thirtieth day of the same month. In the meantime the evidence does tend to show that, by reason of the fact that a railroad company had agreed to construct a railroad to Harrison, the value of the lot had increased from five hundred dollars to seven hundred dollars. This circumstance has raised in my mind some doubt as to whether the relief should be granted after such a change in value. But plaintiff had already paid nearly a third of the purchase money, and it would be inequitable to permit defendants to hold this money and the land also. It was said in a recent case that "where a contract has been partially performed, and one of the parties makes default, the other has a choice of remedies. He may rescind, or he may affirm the contract, but he cannot do both. If he would rescind it, he must immediately return whatever of value he has received under it, and then he may defend against an action for specific performance": German Savings Inst. v. De La Vergne Refrigerator Mach. Co., 70 Fed. 146, 17 C. C. A. 34. Now, in this case the defendants

gave the plaintiff no notice that they would rescind the contract unless payment was promptly made, and they made no offer to return the part of the purchase money that had been paid. But, treating the contract as an option only, they sold the lot to other parties for four hundred and twenty-five dollars, a less price than plaintiff agreed to pay, and did this after plaintiff had tendered the balance due on the land. These subsequent purchasers had full notice of the rights of [365] plaintiff, and have no greater rights than the vendors in whose shoes they stand. The price at which defendants made this last sale tends to show that the increase in value had not been great. As plaintiff had paid nearly a third of the purchase price, and as the delay in making the tender of the remainder due was not great, we are of the opinion in the whole case that the equities are in favor of the plaintiff, and that the relief prayed should have been granted.

The evidence does not show whether plaintiff, in addition to the remainder of the purchase price and interest, tendered also the taxes which defendants say that they paid on the land subsequent to the contract of sale. After the date of that contract equity regards the land as belonging to plaintiff, and the purchase price as a debt due the defendants. Plaintiff should therefore pay the taxes accruing subsequent to the purchase. If he failed to tender the taxes, this might justify the court in taxing him with some, if not all, the costs in the action, but as we do not know the facts in reference to the taxes, we are not able to determine whether plaintiff should be taxed with a part of the costs or not. The judgment of the circuit court will, therefore, be reversed, and the case remanded, with an order that, upon payment in court of the purchase money, taxes and interest, a decree for specific performance be rendered, with such order as to costs as to the court may seem just and equitable.

The Requirements of the Statutes of Frauds, in reference to a contract for the sale of land, may be satisfied by a writing signed by the vendor alone: Brodhead v. Reinbold, 200 Pa. St. 618, 86 Am. St. Rep. 735, and cases cited in the cross-reference note thereto; McPherson v. Fargo, 10 S. Dak. 611, 66 Am. St. Rep. 723; Peevey v. Haughton, 72 Miss. 918, 48 Am. St. Rep. 592; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17; Lee v. Cherry, 85 Tenn. 707, 4 Am. St. Rep. 300.

Time as the Essence of Contracts for the sale of land is the subject of a recent monographic note to Boldt v. Early, 104 Am. St. Rep. 265-276.

PATTON v. CRUCE.

[72 Ark. 421, 81 S. W. 380.]

LIBEL.—One Libel cannot be Set Off Against Another. Hence, it is no defense to an action of libel that the plaintiff and the defendant voluntarily engaged in a newspaper controversy and lavished slanderous imputations upon each other, and are equally at fault. (p. 49.)

LIBEL IN NEWSPAPERS—Answers to, When Privileged.—If one's good name is assailed in a newspaper, he may reply defending himself, and if his reply is made in good faith, without malice, and not unnecessarily defamatory of his assailant, it is privileged. (p. 49.)

LIBEL—Mitigation of Damages by Counter-libel.—If one is libeled in a newspaper, and, replying in the heat of passion, goes beyond what is required for a full and fair reply, and publishes an independent libel against his opponent, the original or first libel may be considered by the jury in mitigation of damages. (p. 49.)

LIBEL—Instruction, Where There are Different Counts.—If, in a complaint for libel, there are several counts, some of which are for matters libelous per se, and other for matters which are not so libelous, an instruction that each count sets up a libel and is libelous per se and the verdict should be for the plaintiff is properly refused. (p. 50.)

LIBEL—What Words are Libelous Per Se.—To charge one with being a secret slanderer and scandal-monger, with betraying his friends and telling lodge secrets, is libelous per se. (p. 50.)

J. F. Sellers, for the appellant.

A. F. Vandeventer, F. N. Bruce and Charles C. Reid, for the appellee.

421 RIDDICK, J. The plaintiff, John Patton, and the defendant, C. E. Cruce, live in the town of Morrilton. The defendant is the editor of a weekly newspaper, the Morrilton "Democrat," published in that town. In the fall of 1899 there was published in this paper the following aphorism, to wit: "A person never makes anything by 422 deserting his friends and lying down with his enemies." The plaintiff Patton, on account of some disagreement he had with Cruce, understood this as having reference to him. And he had published in the "Headlight," a paper published in the same town, an article which he intended as a reply to the remark of Cruce, and in which he said that "A man never makes anything by being a chronic kicker, ready to jump on everything in sight that does not suit him, and has for his motto, 'What's in it for me?'" In this article the defendant was referred to as "a lying reprobate," though his name was not mentioned, but plaintiff after-

ward, in a conversation with the defendant, disclaimed having written those last words, stating that they were probably inserted by the editor, but he made no public retraction of them. It is not shown that the defendant made any reply to this article, but in the following spring Patton was elected mayor of Morrilton. Shortly afterward, hearing that the defendant had made some disparaging remarks about the firm of which he was a member, he withdrew his subscription to the paper of defendant, and told him to stop sending it. This action of Patton called forth the following, which Cruce published in his paper, to wit: "Now is the cup of our sorrow full, and our tears copious. The mayor of Morrilton has discontinued his subscription to the 'Democrat.' It is tough, and we acknowledge it. If we do not survive the shock we will go into bankruptcy. Meanwhile, you might read up on the laws, as you might be appointed receiver to inherit the ill-will a lot of soreheads of this city have for the 'Democrat.'" This is made the basis of the first count in the complaint, it being alleged that thereby defendant intended to charge that plaintiff was "a sorehead, a chronic grumbler, and disgruntled in politics," and that the intent and effect of the charge was to bring plaintiff into ridicule, to his damage in the sum of one thousand dollars.

The second count charges that on the 10th of August, 1900, the defendant published of and about the plaintiff the following language: "John Patton, who is mayor, announces in last week's 'Headlight' that he will in the near future launch a first-class weekly newspaper in this city, to fill 'the long-felt want,' and that it will have a larger circulation than the 'Weekly Bunghole Sucker.' . . . . He does not state whether or not he will backbite his [423] friends and lay down with his enemies, or even whether he will tell secrets out of the lodge. There are many things he left off his prospectus that the public is intensely interested in, but then he is a rather peculiar individual, who can change friends and issues upon very short order." It was alleged that defendant intended by this language to falsely accuse plaintiff of being a secret slanderer and scandal-monger, with betraying lodge secrets, and of betraying his friends, to the further damage of plaintiff in the sum of one thousand dollars.

On the 31st of August, 1900, the plaintiff published in the "Headlight" the following article: "The mayor, who is John Patton, is in constant dread that some 'big' man will visit our

city and not give him an opportunity to grow a beard and have a genuine dignified appearance. No doubt, he is aware that nature was only lavish to him in one respect. She endowed him with brains, for at least enough to fill any position that he has held up to date with satisfaction to those who are his friends. However, we feel that, should the necessity arise, there is one individual in Morrilton who could be appointed a committee of one to entertain our long-looked-for visitors, and when the rotund and Falstaff-like form, accompanied by his dignified and classic appearance, is taken into consideration, the small matter of brains will be overlooked." The individual referred to as having "the rotund and Falstaff-like form" was the defendant Cruce, who, on the 7th of September following, replied as follows: "September, 1900.—The 'Headlight' has made a wonderful discovery. It has discovered that John Patton, who is mayor, has brains. Now, let the public watch developments." This publication by Cruce is made the basis of the third count in the complaint.

There are other counts in the complaint, and the total amount of damages claimed was ten thousand dollars, but some of these counts are lengthy, and it is not necessary to set out the complaint in full.

The answer of the defendant alleged that the publications were made from time to time by him in response to publications by the plaintiff in which the defendant was assailed and his good name and character attacked, and that the publications of defendant were made in legitimate defense of his own name and character, and were without malice, and were therefore privileged.

[424] On the trial there was a verdict for the defendant, and the plaintiff appealed.

[425] This is an action for libel, brought by John Patton against C. E. Cruce to recover damages on account of certain publications made by defendant, and which the plaintiff alleges were libelous. The defense set up by defendant against this action of the plaintiff was that the publications complained of were made in response to publications against him made by defendant, that the publications by plaintiff were made necessary by the attacks of the defendant, and went no further than was required in order to make a full and fair reply to those publications.

The presiding judge, in his charge to the jury, gave a very satisfactory and clear statement of the law of the case to the

jury, with the exception of one instruction, which he gave at request of defendant. That instruction was as follows: "If the plaintiff and defendant voluntarily engaged in a newspaper controversy, and lavished slanderous imputations upon each other, and both were equally at fault, neither of them can claim damage from the other, and your verdict should be for the defendant." The evidence shows that these parties did engage in a newspaper controversy, and, taking all the evidence in reference to that controversy that we have before us, we do not see that the defendant was more culpable than plaintiff himself. If the law was as stated in the above instruction, it would therefore be our duty, as well as our pleasure, to affirm the judgment; for, if one libel could be set off against another, we do not think that plaintiff would be entitled to anything in this action. But one libel cannot be set off against another independent libel. Yet, under the instruction quoted, the jury may have found that each of these parties were guilty of separate and independent libels against each other, and that, being equally to blame, neither could maintain an action therefor against the other. We are therefore of the opinion that this instruction was incorrect and misleading: Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527, 80 N. W. 575, 46 L. R. A. 397.

If one's good name and character is assailed in a newspaper, he may, of course, reply, and defend himself, and if his reply is made in good faith, without malice, and is not unnecessarily defamatory of his assailant, the reply will be privileged: 18 Am. & Eng. Ency. of Law, 1033.

[426] And even if, in the heat of passion, he should go beyond what a full and fair reply required, and published a separate and independent libel against his opponent, the jury, in estimating the damages, may take into consideration the previous libel committed against him and the provocation under which he labored, and, if they find that plaintiff himself was greatly to blame, they may, if they deem proper, allow him only nominal damages. In other words, in determining the amount of damages to which the plaintiff is entitled for a libel, it is proper to take into consideration the circumstances under which the libel was committed, and whether plaintiff was himself to blame for the controversy: Kelly v. Sherlock, L. R. 1 Q. B. 686.

The plaintiff had, as before stated, six counts in his complaint, and he asked the court to instruct the jury that each of the counts except the sixth "describes and sets up a libel, and is libelous per se, and that the verdict should be for the plain-

tiff." Now, the words set out in some of the counts, we think, were libelous per se. For instance, the second count alleges that by the language therein set out the defendant intended and did accuse plaintiff of being a secret slanderer and scandal-monger, with betraying his friends, and telling lodge secrets. This, if proved, was clearly libelous per se. But the instruction requested stated that each of the counts except the sixth sets up language that was libelous per se, and in this form we think was properly refused, for, while this may be true of some of the counts, it is not, we think, true of all.

Again, most of these publications of which plaintiff complains seem to have been directly called forth by publications on his part in which he attempted to ridicule and make sport of the defendant. Some of these replies made by defendant were, it seems to us, very mild retorts when the provocation under which they were made is considered. Plaintiff must have known that his shots at the defendant would provoke a return fire. In fact, he stated on the stand that some of these articles were written for that purpose. "I meant," he said, "for Cruce to come back at me." This being so, we do not see that he has much right to complain because Cruce did come back at him. Honors in that respect were so nearly even between them that we see very little reason why either should recover damages from the other. [427] While therefore, we feel considerable doubt as to whether the plaintiff is entitled, under the proof, to any substantial damages, yet for the error referred to the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

A Publication which is fairly an answer to a libel, published in good faith to repel the charge, is privileged. And in an action for libel based upon a published reply to a libelous article, the latter is admissible in evidence as showing a provocation: Brewer v. Chase, 121 Mich. 526, 80 Am. St. Rep. 527. On what libelous statements are privileged in general, see the recent monographic note to Holmes v. Clisby, 104 Am. St. Rep. 110-151; and on justification in slander and libel, see the monographic note to Rutherford v. Paddock, 91 Am. St. Rep. 285-309. That an action for slander cannot be maintained if the case is one of mutual exchange of opprobrious epithets, of vituperation and abuse on both sides, see Bloom v. Crescioni, 109 La. 667, 94 Am. St. Rep. 456.

FORT SMITH v. HUNT.

[72 Ark. 556, 82 S. W. 163.]

MUNICIPAL CORPORATIONS—License Fees, Power of to Exact.—A city, notwithstanding it has enacted an ordinance authorizing an electric company to erect and maintain poles and to string wires thereon in the public streets, and has provided rules and regulations for the government of those maintaining such poles and wires, may by a subsequent ordinance require the owners of every electric light or street railway having poles standing upon a street, avenue or alley of the city to pay an annual license of twenty-five cents per pole, and such ordinance will be construed as imposing a license for paying the expenses of enforcing rules and regulations already in force. (p. 56.)

MUNICIPAL CORPORATIONS.—The Power to License and Regulate, granted by the state, is deemed to be conferred solely for police purposes, and cannot be used as a means of increasing the municipal revenue. The license fee may be sufficient to cover all expenses of issuing the license and to pay all expenses which may be incurred in the enforcement of such police inspection and superintendence as may be lawfully exercised over the business. (p. 56.)

MUNICIPAL CORPORATIONS—License Fees, When will not be Regarded as in Excess of Municipal Power.—If a license fee exacted by a municipality is not apparently unreasonable, the courts will not interfere with the discretion of the city council in fixing it, and, unless the contrary appears on the face of the ordinance or is established by proper evidence, such fee will be presumed to be reasonable. (p. 57.)

MUNICIPAL CORPORATIONS—Police Powers Contracts Respecting the Exercise of.—A municipal corporation cannot by contract devest itself of its right to exercise its police powers. (p. 58.)

J. F. O'Melia, for the appellant.

Mechem & Bryant, for the appellee.

557 BATTLE, J. This appeal grows out of the prosecution of R. G. Hunt, general manager of the Fort Smith and Van Buren Light and Transit Company, charged with the violation of an ordinance of the city of Fort Smith.

The bill of exceptions shows that the cause was submitted to the court sitting as a jury on the following agreed statement of facts:

"1. On February 12, 1894, the city of Fort Smith, by ordinance No. 329, granted to the Fort Smith and Van Buren Electric Street Railway, Light and Power Company, its legal representatives, successors and assignees, the right to build, equip and maintain on certain streets of said city an electric trolley street railroad, and to erect and maintain an electric light plant

558 for lights, heat and power, and to enter upon the streets, alleys and avenues of said city and erect necessary poles and string wires thereon for the purpose of operating said railroad and light and power plant, for the service of private individuals and the public, this grant to exist for thirty years; provided that the position of the poles, wires, pipes, conduits, etc., shall be subject to all provisions of ordinance No. 300, except that the said company is exempt from section 6 of said ordinance No. 300.

"2. Whenever it may be necessary in the construction and operation of such lines and plants for said lines to cross each other, the electric wire shall not run nearer than five feet to the said telegraph or telephone wires, and such crossing shall be inspected and approved by the city engineer. Before any company shall erect its poles in and along any street or alley, it shall submit the route of its supposed line to the city engineer, and all excavating, refilling and restoring of any pavement shall be done to the satisfaction of said city engineer at the expense of said company.

"3. The Fort Smith and Van Buren Light and Transit Company, in erecting its poles, stringing its wires, excavating, refilling and restoring of pavement have submitted the route of said improvement to the city engineer, who has inspected said work from time to time, and the said company has never paid the city or city engineer any compensation for said inspection, has continued to place poles and string wires since the passage of ordinance No. 525, and refused to abide by the terms of said ordinance.

"4. This grant was made upon the condition that the grantee would have the street railroad in practical operation within six months from its date, and the light and power plant within eighteen months from its date, and that upon a failure to construct within said time or to maintain the same thereafter the privileges granted by the ordinance were forfeited.

"5. The ordinance provided the character of wires, poles and appliances to be used, fixed the rate of fare on the railway as not to exceed five cents, and required the company to carry uniformed policemen free and fixed the minimum charge for incandescent and arc lights.

559 "6. It is also provided that the company should pay a tax on all its property in the city which is taxable by law at the same rate of taxation imposed upon the property of any other citizen.

"7. The grantee complied with said ordinance by building, equipping and operating its railroad and light, heat and power plant within the time designated in the ordinance.

"8. On the —— day of ————, the said Fort Smith and Van Buren Electric Street Railway and Power Company consolidated with the Fort Smith Gaslight Company, under the name of the Fort Smith and Van Buren Light and Transit Company, which thereby became the owner of the street railway and electrical light, heat and power plant and all the property, franchises and rights granted to said first-mentioned corporation by the ordinance No. 329 aforesaid.

"9. All poles belonging to said Fort Smith and Van Buren Light and Transit Company now standing upon the streets, avenues and alleys of said city were erected by the owners of said street railroad and electric light and power plant for the sole purpose of necessary use in the operation of the same.

"10. The said grantee in said ordinance and the present owner of said street railway and said electric light, heat and power plant on or before the nineteenth day of March, 1900, had expended in said city, on the faith and under the terms of said ordinance, the sum of one hundred thousand dollars in the erection and equipment of said street railway and said electric light, heat and power plant.

"11. On March 19, 1900, the said city enacted ordinance No. 525, by which it required the owners of every electric light or street railway pole standing upon the street, avenue or alleys of said city to pay said city an annual license of twenty-five cents per pole. Said ordinance in terms exempted from its requirements all corporations having contracts with the city, so long as said contract is existing between such persons or corporation or company and the city, which required in their performance the putting of such poles in the streets. That the foregoing proviso only applies to such poles as are necessary and properly in use by such person, company or corporation in the fulfillment of his or its contract.

500 "12. It is further agreed that the whole or any section or sections of said ordinance may be considered by the court or introduced by either party, together with any other kind of evidence that either party may see fit to choose to offer.

"13. The company had seven hundred and seventy-nine poles in the streets on the first day of January, 1902, of which sixty-five were erected after the passage of ordinance No. 525, making a total of seven hundred and seventy-nine, without paying

the sum of twenty-five cents for each pole, amounting to one hundred and ninety-four dollars and seventy-five cents per year.

"14. It is agreed that the city engineer receive a salary of eighty-three and one-third dollars per month, or one thousand dollars per year, for his services, which is paid by the city of Fort Smith, Arkansas.

"15. The city has a chief of police who receives a salary of eighty-three and one-third dollars per month, together with eight policemen who receive a salary of sixty dollars per month each. The fire department has one chief on a salary of forty-one and two-thirds dollars per month with four regular firemen on a salary of forty-five dollars per month each, one foreman at fifty dollars, and one engineer at sixty dollars per month, which is paid by the city.

"16. The defendant is the general manager of the Fort Smith and Van Buren Light and Transit Company, and has neglected to comply with the said last-mentioned ordinance by returning a statement of the number of poles which said corporation has in the streets, avenues and alleys of said city. By the terms of said last-mentioned ordinance, if said corporation is liable to pay said charge, the defendant is subject to a fine of not less than five dollars nor more than twenty-five dollars for neglecting to make such statement annually. Upon the foregoing facts the sole question presented is whether the Fort Smith and Van Buren Light and Transit Company can be compelled by the plaintiff city, under its police power, to pay said pole license on the poles put in and maintained under said ordinances. If it can, defendant is guilty; if not, he is not guilty."

Section 1 of ordinance No. 525, which appellee violated, is as follows: "Section 1. That every person and light, power company, street-car company or other corporation who shall erect, maintain and use any pole or poles on any of the public streets and alleys of this city shall pay to the city annually, as a license therefor, a sum equal to twenty-five cents for each and every pole so erected, [561] maintained or used on said streets and alleys by such person, or by such telegraph, telephone, electric light, power company, street-car company or other corporation."

And the following sections are a part of ordinance No. 300:

"Be It Ordained by the City Council of the City of Fort Smith, Ark.:

"Section 1. Any telegraph, telephone or electric light company duly incorporated according to law, doing or desiring to

do business in the city of Fort Smith, is hereby authorized to set its poles, pins, abutments, wires and other fixtures along and across any public streets or alleys subject to the regulations hereinafter provided.

"Sec. 2. Whenever it is practicable to place the poles in and along an alley, instead of in and along a street, the practicability of which shall be submitted to the city engineer, the poles of such company shall be placed in and along said alley, instead of in and along said street; provided, however, that telegraph and telephone poles shall not be placed in and along the same alley with electric light poles. Whenever the poles of any such company are set in any alley, they shall be located as near the side line of the alley as practicable, and in such manner as to not incommode the public travel or the adjoining proprietors or residents. Whenever the poles of any such company are placed in and along any such street, the telephone and telegraph poles and wires shall not be placed on the same side of the street with the electric light poles and wires, and when placed in and along any street, they shall be placed in all cases on the outer edge of the sidewalk just inside the curbing, and in no case be so placed as to obstruct the drainage of the streets or to interfere with or damage in any way the curbstone, trees, or other private property upon the streets or alleys where such poles are erected, nor interfere with or obstruct the light or reflection of light from any public street light, as far as practicable.

"Sec. 3. The poles used by any of said companies shall be of sound timber, and all poles hereafter put up shall be not less than five inches in diameter at the upper end, straight, shapely and of uniform size, neatly shaved or planed, and painted with one or more coats of lead and oil paint, each company using a different color. The telephone and telegraph wires shall run [562] at a height of not less than twenty-five feet above the grade of a street or alley, except in the suburbs or residence portions of said city, where they shall be run at a height of not less than twenty feet above the grade of a street or alley; and the electric light wire shall be placed at a height above the grade of a street or alley not less than twenty feet. Whenever it may be necessary in the construction and operation of such lines and plants for said lines to cross each other, the electric wire shall not run nearer than five feet to the said telegraph or telephone wire, and such crossing shall be inspected and approved by the city engineer, to whom notice of such intended crossing shall be given by the company making such

crossing before it is done; and the telegraph and telephone wires shall not be nearer each other than three feet.

"Sec. 4. Before any company shall erect its poles in and along any street or alley, it shall submit the route of its supposed line to the city engineer, and all excavating, refilling and restoring of any pavement shall be done to the satisfaction of said city engineer at the expense of said company.

"Sec. 5. The above several companies shall set and locate their poles along their lines so as not to obstruct the streets, alleys, gutters and drainage therein, or to damage public or private property in said street or alley, and they may be required, upon ten days' notice given by the mayor, to alter the location of any pole or poles along the lines of said company so obstructing the streets, alleys and gutters and drains as to be injurious to public or private property, and any violation of this section shall be a misdemeanor, and punished as hereinafter provided."

Appellee contends that the twenty-five cents demanded by the city of Fort Smith for each pole, under section 1 of ordinance No. 525, is "an explicit demand of rental for the use of the streets." The ordinance requires every person and corporation, who shall erect, maintain and use any pole or poles on any of the public streets and alleys of Fort Smith to pay to the city, as a license therefor, a sum equal to twenty-five cents for each of such poles. The sum is required to be paid as a license. As used in the ordinance, the word "license" means the sum paid for permission to erect or maintain poles in the streets and alleys of the city, for the purpose of defraying the expenses of regulating and [563] controlling the use of the same, under the police power of the city. This is necessary for the protection of the public against the electricity with which the wires on the poles may be charged, against the falling of the wires and poles, and the obstruction of the public highway, and for other purposes. This is a duty the city owes to the citizen.

The rules and regulations for the government of those erecting and maintaining poles in Fort Smith, and the duties of the city engineer in respect thereto, are prescribed, in part, if not wholly, by ordinance No. 300. But this does not exhaust the police power of the city in respect to such poles. The city council may hereafter prescribe other rules and regulations for the same object. For the purpose of paying the expenses of enforcing such rules and regulations already in force, a license fee may be demanded and collected.

Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300, 67 S. W. 761, is unlike this case. In that case this court merely held that the city of Hot Springs had no right to demand and collect a rental charge for the use of the ground occupied by the poles of the light company.

The following words, used in Fayetteville v. Carter, 52 Ark. 301, 302, 12 S. W. 573, 6 L. R. A. 509, are applicable in this case: "The power to license and regulate, granted by the statute, was conferred solely for police purposes; and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license, and to pay the expenses which may be incurred in the enforcement of such police inspection or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot, in all cases, be ascertained in advance, and that 'it would be futile to require anything of the kind.' The result is, if the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it reasonable."

564 The contract of Fort Smith with the Fort Smith and Van Buren Electric Street Railway and Transit Company in respect to the poles does not interfere with the exercise of the city's police power in this case. The state, much less the city, cannot devest itself of such power.

In Beer Co. v. Massachusetts, 97 U. S. 25, 33, 24 L. ed. 989, Mr. Justice Bradley, in delivering the opinion of the court, said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'Salus populi suprema

lex'; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 672, 6 Sup. Ct. Rep. 252, 29 L. ed. 516, Mr. Justice Harlan, in behalf of the court, said: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

Mr. Justice Shaw said, in Commonwealth v. Alger, 7 Cush. 84, that it was "a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the rights of the community. All property in this commonwealth is . . . . held subject to these general regulations, which are necessary to the common good and general welfare."

[565] Chief Justice Redfield, in Thorpe v. Rutland etc. R. R. Co., 27 Vt. 149, 62 Am. Dec. 625, says: "This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state."

In People v. Squire, 107 N. Y. 593, 606, 1 Am. St. Rep. 893, 14 N. E. 820, it is said: "The right to exercise this [police] power cannot be alienated, surrendered or abridged by the legislature by any grant, contract or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights which it was especially designed to accomplish": Powell v. Pennsylvania, 127 U. S. 678, 683, 8 Sup. Ct. Rep. 992, 32 L. ed. 253; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. ed. 585; Toledo etc. Ry. Co. v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Cooley's Constitutional Limitations, 7th ed., 399, 400.

What has been said as to the state's right to devest itself of the police power applies with greater force to cities. The crea-

ture is not greater than its creator; and the state cannot delegate to the cities, its governmental agencies, greater power than it has.

Reverse and remand for a new trial.

Where Telegraph Companies, although engaged in interstate commerce, carry on their business so as to justify police supervision, a municipal corporation may exact reasonable license fees from them to defray the expenses of such supervision. The fees, however, must not be so far in excess of the cost of inspection and supervision as to render it evident that they are imposed, not to pay such expenses, but as a means of raising revenue: Atlantic etc. Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. Rep. 817, 47 L. ed. 985; Postal Tel. etc. Co. v. Taylor, 192 U. S. 64, 24 Sup. Ct. Rep. 208, 48 L. ed. 342. See, too, Postal Tel. Co. v. Richmond, 99 Va. 102, 86 Am. St. Rep. 877; New Orleans v. Great Southern Tel. etc. Co., 40 La. Ann. 41, 8 Am. St. Rep. 502.

CASES

IN THE

SUPREME COURT

OF

COLORADO.

TREASURY TUNNEL MINING AND REDUCTION COMPANY v. BOSS.

[32 Colo. 27, 74 Pac. 888.]

MINES AND MINING—Locating Mining Claims—Discovery Notice.—As against another and subsequent location, a prior lode claim is good, in locating which all statutory requirements have been complied with, except the mere failure to place a discovery notice upon the ground at the point of the only valid discovery made on the claim, if such notice was posted at the point of a former but invalid discovery as recited in the recorded location certificate, and if the boundaries remain the same after as before the true discovery. (p. 61.)

Henry & Sigfrid, for the appellant.

J. T. Barnett, for the appellee.

28 CAMPBELL, C. J. This controversy concerns a strip of land included within two conflicting lode mining locations, the Maggie A. and the Liverpool. The original location of the Liverpool was first in order of time, and was made on the twenty-third day of May, 1887. On the twelfth day of July, 1897, an attempt, at least, was made to locate the Maggie A., and it is conceded that in all respects it would be a valid location had not the discovery work been done within the exterior boundary lines of another mining claim previously patented. To cure this vital defect, the owners of the Maggie A. thereafter and on the 15th of October, 1897, made a valid discovery of mineral upon the same vein and within one hundred feet of the former discovery, and did the necessary discovery work, within its exterior boundaries. Up to this time there was no conflict of territory between the two locations as

thus made, but on the fourth day of October, 1900, the owners of the Liverpool location relocated the same—knowing at the time of the attempt of the Maggie A. owner to perfect his location by making a good discovery [29]—and in doing so the boundaries were swung from their original position so as to include therein considerable ground not within the location as originally staked upon the ground, a portion of which is the ground in controversy here.

The case was tried to the court without a jury and findings of fact were made and judgment rendered in favor of the owner of the Liverpool lode. The court held as a matter of law that the Maggie A. was not a valid location at the time of the relocation of the Liverpool solely because its locator had failed to comply with what, in the judgment of the court, was a prerequisite to a valid location of a lode mining claim upon the public domain of the United States, viz., that although a valid discovery of mineral was made, and the required discovery work done, within the limits of the Maggie A. location before the relocation of the Liverpool, yet the locator of the former did not post at the point of such second, and only, valid discovery on the surface of the ground a sign or notice, which, it is said, section 3152 of Mills' Annotated Statutes requires shall be done. In every other respect the court considered the Maggie A. a valid location.

"The acts of Congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can readily be traced": Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482.

The acts of Congress provide, however, that the acquisition of mineral lands may be subject to local laws and the rules or customs of miners, so far as the same are applicable and not inconsistent with the laws of the United States. Our General Assembly [30] has, in accordance with this permissive legislation, enacted in section 3150 of Mills' Annotated Statutes that a location certificate must be filed within three months from the date of the discovery of mineral which shall contain the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the

lode, as near as may be; and has also declared, in section 3152 of Mills' Annotated Statutes that, before the filing of such location certificate, the discoverer shall locate his claim by (1) sinking a discovery shaft upon the lode, etc.; (2) by posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery; (3) by marking the surface boundaries of the claim. This statute has not been assailed as invalid.

It will be observed from the statement of facts that the sole legal question for decision is whether in this state, as against another and subsequent valid location, a prior lode claim is good in locating which all the federal and state statutory requirements have been complied with except the mere failure to place a discovery notice upon the ground at the point of the only valid discovery made on the claim, when such notice was posted at the point of a former, but invalid, discovery, as recited in the recorded location certificate, and when the boundaries remain the same after, as before, the true discovery.

One object of the requirement that the discoverer shall, before filing his location certificate, post at the point of discovery a notice, is that those wishing to make subsequent locations may thereby be advised of the ground already appropriated, and this serves to hold his ground until his location is perfected within the statutory time. After the location [31] certificate is filed, the same object is secured in the shape of a permanent record which the statute requires shall contain not only the same facts which must appear on the sign or notice placed at the point of discovery on the ground, but still other data identifying the location. When filed in the proper office, the certificate takes the place of the notice on the ground, and and after it is filed there is no necessity for posting, or keeping, at the point of a new and valid discovery, if the first alleged discovery is void, of a notice of what particular ground is claimed. The recorded notice sufficiently describes the ground claimed, and this recorded notice contains precisely the same things which the new notice, if posted, would include. Subsequent locators are already sufficiently, and duly, notified by that record, and the posting of a new notice would not give them any information which the record does not already furnish. It is a well-known fact that the boundaries as marked upon the ground, and the notices thereupon posted, within a very short time often disappear, and there is no requirement in the law that they shall be maintained or replaced by the locator in order to keep his location good.

In Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 53 L. R. A. 793, it was held that the order of time in which the several acts of location were performed is not of the essence of the statutory requirement, and that it is immaterial that the discovery was made subsequent to the completion of the acts of location; provided, only, all the necessary acts are taken before intervening rights of third parties accrue; and it was there said that if all these necessary steps have been taken before intervening rights accrue, it would be useless and idle ceremony, where the discovery follows all the other acts of location, for the locator again to locate his claim, or to refile the old location certificate, or to [32] file a new one. Where the locator has performed all the several acts of location, except the discovery of mineral, and then makes a subsequent valid discovery, if no changes in boundaries occur, there is no reason why he should put at the point of the valid discovery a new notice for sufficient notice is already of record. In construing our statute we must keep in mind the objects of the different statutory requirements, and when there has been substantial compliance therewith, the statute is satisfied. In this case, before the Liverpool was relocated, notice by the recorded certificate had been given to the world of the segregation of the territory which the owners of the Maggie A. claimed; hence no rights of third parties would be protected or safeguarded by requiring the locators again to post at the point of a subsequent discovery a location stake or notice, for, if so placed, it would have on it only what the permanent record shows. We limit our decision to the facts before us. What may be the rule if the facts are essentially different from those in the case at bar, we are not called upon to determine.

The judgment of the district court being in conflict with this conclusion, it is reversed, and the cause remanded with instructions to enter judgment in favor of the appellant with respect to the Maggie A. lode.

The Fact that Mineral is not discovered on a mining claim until after posting the notice of location and marking the boundaries is immaterial, in the absence of intervening rights; if the discovery is the result of subsequent work, the possessory rights are complete from the date of such discovery: Cedar Canyon Con. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188. Compare Gemmell v. Swain, 28 Mont. 331, 98 Am. St. Rep. 570; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63. The principal case is cited in McMillen v. Ferrum Min. Co., 32 Colo. 38, post, p. 64.

McMILLEN v. FERRUM MINING COMPANY.

[32 Colo. 38, 74 Pac. 461.]

MINES AND MINING—Location of Claim—Discovery.—It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location, and if it appears that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it, and thus avoid the necessity of making a discovery for himself. In order to do this he must claim and adopt such previous discovery as his own and base his location upon it. (p. 67.)

MINES AND MINING—Location of Claim—Discovery.—If the locator of a mining claim himself selects the discovery shaft as the one in which the discovery of mineral has been made, and there posts his location stake and notice, and bases his location upon such discovery, he cannot after intervening rights have attached, abandon such discovery point, neglect to comply with the statute, and then select another discovery upon which his location was not predicated. (p. 68.)

MINES AND MINING—Location of Claim—Discovery of Mineral.—If a locator relocates an abandoned mining claim, sinks his discovery shaft, and posts his notice several hundred feet from the discovery shaft of the abandoned claim, designating in his location certificate his discovery as in the shaft sunk by him, but fails to make a discovery of mineral therein, the fact that he knew of a vein of ore on the claim that had been found in the abandoned discovery shaft does not make his location valid. (p. 69.)

ESTOPPEL.—Persons cannot be Heard to Say that they may at will disregard the mandatory provisions of a statute which they themselves have invoked. (p. 69.)

MINES AND MINING—Location of Claim—Underground Discovery.—If a prior locator for a mining claim claims a discovery of mineral in his discovery shaft on which his location is based, and it appears that no valid discovery has been made in such shaft, it is incompetent for him to prove an underground discovery made through an adjoining claim when such discovery is not followed by filing an amended location certificate, and such discovery was made after a subsequent locator has made a valid discovery of mineral and perfected a location on the same claim. (p. 71.)

JURY—Viewing Premises.—A statute making it the duty of the court, in certain cases, upon application of either party to send the jury in a body to view and inspect the premises in dispute, does not apply when the party making the request has not introduced evidence sufficient to make out a case for submission to the jury. (p. 72.)

MINES AND MINING—Location of Claim—Discovery—Posting Notice.—If a locator of a mining claim makes a second discovery of mineral thereon and amends his location certificate so as to base his location on such discovery, it is not necessary to the validity of his claim or location that he post notice at the point of such discovery. (p. 73.)

G. R. Elder, for the appellants.

C. Cavender, J. A. Ewing and F. E. Bouck, for the appellee.

[39] CAMPBELL, C. J. This is an action brought by plaintiffs below as the owners of the Eulalia lode in support of an adverse claim filed by them in the United States land office against the application for patent by the defendant for the Golden Rod lode claim, situate in Leadville mining district. At the close of the trial the court ruled that under the pleadings and evidence plaintiffs had not made out their case, and after instructing the jury as to the essential requirements of a lode location said that if defendant had complied therewith a verdict should be returned for it. There was a verdict for the defendant, and from the judgment [40] thereon entered plaintiffs have brought the case here by appeal.

A number of rulings of the district court have been attacked as erroneous and argued by counsel which, were appellants in a position to complain, would merit most careful consideration. But since we have reached the conclusion that the trial court was right when it instructed the jury that plaintiffs were not entitled to recover, because they had not shown a valid discovery of mineral in their location, it follows that many of the rulings attacked, even if wrong, are not prejudicial to plaintiffs, and we, therefore, determine only that assignment relating to such discovery, as it is the only one of which they may complain.

1. The ground covered by the two claims is substantially identical. It was formerly included within the limits of the Winter lode, and a part of it was afterward embraced within the exterior lines of the Pocket Liner lode. When, in 1893, plaintiffs' grantor went upon the ground, both of these claims were abandoned, and he proceeded to relocate as an abandoned claim the territory theretofore covered by them, and adopted the boundaries and stakes of the Winter location. He sank a discovery shaft to the depth of about twelve feet, and at the alleged point of discovery posted his location stake, and in due time filed for record his location certificate, in which, as we read it, the discovery is designated as in the discovery shaft.

At the trial, plaintiffs admitted that this discovery shaft did not disclose a well-defined crevice. On the contrary, they conceded that it had not passed through the wash and debris usually encountered upon Breece Hill in the Leadville mining district. Notwithstanding that no discovery was in fact made

in the discovery shaft, and the further fact that the [41] location, as made, was based upon such alleged discovery, plaintiffs contend that since their grantor, the locator, at the time he sought to appropriate the ground as the Eulalia lode, knew of the existence of a vein within the limits of that claim as surveyed—but several hundred feet distant from the discovery shaft of the Eulalia—which he, together with his co-owners of the Pocket Liner lode, had previously discovered in the process of its development, this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location.

That plaintiffs' contention may be correctly stated here, though it involves some repetition, we quote what their counsel said when asked by the trial court his purpose in offering proof of a former discovery and in the Pocket Liner lode:

"Mr. Elder.—The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he in company with the co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the state of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the state of Colorado, by sinking a discovery shaft ten feet in depth," etc.

And again in the printed briefs counsel for appellants says: [42] "We claim for appellants that the discovery made by one of them, Samuel McMillen, in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to the Eulalia lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim on the ground and sinking a discovery shaft over a depth of ten feet, completed the other prerequisite to vest the title in him."

That the rulings of the trial court may also correctly appear, we take the liberty of reproducing what the judge said in reply to an attempt on the part of plaintiffs to show a discovery made

by them in performing assessment work and doing certain other work subsequent to filing their location certificate. "You can," said the judge, "prove this, if possible, any discovery which you made on that ground. I care not where it is, or in what shaft it is; if you have made a discovery, prove it." And again: "If in 1895, you made a discovery upon that ground, and you claim under that discovery, you may go to work and prove your claim under that discovery."

From the foregoing it is apparent that learned counsel for appellants (plaintiffs below) contends that mere knowledge by the Eulalia locator of the existence of a vein in the Pocket Liner made his location valid, provided he performed the other statutory acts of location aside from the actual discovery of mineral.

It has been held that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location. If it appear that the locator knew at the time of making his location that there had been a discovery [43] of a vein or lode within the limits of his location, he may base his location upon it, and thus avoid the necessity of making a discovery for himself. The following are some of the cases: Book v. Justice Min. Co., 58 Fed. 106, 108; Jupiter Min. Co. v. Bodie Con. Min. Co., 11 Fed. 666, 7 Saw. 96; Conway v. Hart, 129 Cal. 480, 62 Pac. 44; Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029; Wenner v. McNulty, 7 Mont. 30, 14 Pac. 643; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673.

But as stated by Judge Ross in the Oil Company case, supra, not only must the locator "have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location"; that is to say, the locator must claim and adopt such previous discovery as his own and base his location upon it.

In the O'Donnell case, supra, the supreme court of Montana, it is true, held that the locator was not confined to the nominal discovery shaft, but might select some other place within the limits of the location and show a valid discovery there. But that decision, as the opinion clearly shows, was based upon section 2320 of the Revised Statutes of the United States, which merely provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and the supreme court of Montana aptly observed that there is no provision for a discovery shaft in the

federal statute or any statute of Montana. The court further said that the fundamental mistake in the argument of counsel that a locator was not permitted to select at will any shaft besides the nominal discovery shaft, was "that it assumes that a notice on the ground, at the point of discovery, is necessary when it is not required by law."

Obviously, had there been in Montana, as there [44] is in Colorado, a statute which specifically declares that the locator shall sink a discovery shaft to the depth of at least ten feet, showing a well-defined crevice, and shall also post at the point of discovery a location stake, the decision there would have been otherwise. And, whatever our views might be when the question is presented, it is a fair inference from the opinion in that case that where, in states that have provisions for discovery shafts and posting of notices on the ground, like our statute, the locator himself selects the discovery shaft as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated.

Now, when tender of proof was made by plaintiffs' counsel of the former discovery, there was no offer to show that it was claimed by their locator or adopted by him as the one on which the Eulalia location was made. For this reason alone the court was justified in refusing to hear the proof offered, for it did not meet the requirements of the decisions in which the doctrine is laid down that a former discovery may be the basis of a valid location.

It is true that in tendering instructions, plaintiffs submitted one which contained the element of an adoption by the relocator of a former discovery as the one upon which his own location was based. There was no error by the trial court, however, in refusing to give this instruction, because there was no evidence, or offer of evidence, by plaintiffs that called for it. The fact that plaintiffs' grantor knew and claimed that there had been a former discovery is not equivalent to, nor does it supply the place of [45] its selection by him as the one on which his location is based, particularly in the light of the declaration in the location certificate that the discovery of the Eulalia location was made in a discovery shaft in no way connected with, and some hundred feet distant from, the place

where the former discovery is said to have been made. It follows from what we have said that plaintiffs have not brought themselves within the doctrine they contend for, and are not in a position to invoke its application to their case as made.

2. There is another reason for holding that plaintiffs may not avail themselves of that rule. It appears that they not only do not question the validity of our state statutes which prescribe certain acts as necessary to a valid location, but in their complaint they aver that, in the location of the Eulalia lode, the provisions of the state, as well as of the federal, statutes were complied with; and among the instructions which they themselves asked the court to give was one—applicable both to their own and the Golden Rod location—in which was the declaration that, as provided by section 3152 of Mills' Annotated Statutes, a valid location of a lode mining claim cannot be made unless the locator sinks a discovery shaft upon the lode discovered to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well-defined crevice, and unless he posts at the point of discovery on the surface a location stake containing certain designated things.

Such being true, plaintiffs certainly cannot now be heard to say that they may at their will disregard these mandatory provisions of state legislation which they themselves have invoked, for, if we assume their validity (which plaintiffs themselves do not question, and which they declare they have complied with), the [46] discovery shaft must expose the vein upon which the location of the Eulalia lode was based, or at least one vein, and a discovery elsewhere within the limits of the claim will not supply its place: Beals v. Cone, 27 Colo. 473, 499, 83 Am. St. Rep. 92, 62 Pac. 948.

Lindley on Mines, at section 250 (15), says that state courts have uniformly enforced provisions like those of ours concerning discovery shafts and posting of notices, notwithstanding doubts by the Interior Department as to their validity: See, also, Van Zandt v. Argentine Min. Co., 8 Fed. 725, 2 McCrary, 159; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. Rep. 1356, 30 L. ed. 1140, and Morrison's Mining Rights, 9th ed., 29. But, as already shown, plaintiffs are not questioning their binding force and are not in a position to do so.

3. From what has already been stated, it is clear that the trial court did not preclude plaintiffs from showing a valid

discovery of mineral within the limits of the Eulalia location before the rights of defendant attached, though from a superficial examination of the record the contrary might appear. The assertion that defendant has failed to establish a valid location is not borne out by the evidence. Defendant's proof in that behalf is amply sufficient to show a valid location, assuming, as the record justifies, that plaintiffs' location was invalid.

We feel it to be our duty not to close this opinion without expressing our disapproval of the severe strictures made by counsel for appellants upon the rulings of the trial court. Doubtless, he sincerely believed that injustice had been done his clients, but sarcastic references to the trial judge and invective employed against him do not aid appellate courts in determining legal controversies.

A careful examination of this record satisfies us that no error was committed by the trial court of [47] which appellants may complain. The judgment should, therefore, be affirmed and it is so ordered.

ON PETITION FOR REHEARING.

CAMPBELL, C. J. In the oral argument in support of their petition for rehearing, counsel for appellants confined himself to three general propositions, and to these will our discussion be mainly devoted.

1. That the locators of the Eulalia lode might have availed themselves of a previous discovery within the limits of that location, and might have adopted the same as their own and based their location upon it without making a valid discovery for themselves, there can be no doubt under the authorities cited in the foregoing opinion. Appellants' argument as to this point may be dismissed with the single observation, which, in fact, has already been made, that they did not do so. The record clearly shows that they have not brought their case within the principle contended for, since in their offer of proof they expressly rely upon mere knowledge of a former discovery and make no pretense of having adopted it as their own. It is apparent that appellants, while right in their statement of the law, are wrong in supposing that the facts of this case call for the application of any such principle.

2. Appellants again call to our attention their assignments of error directed against the rulings of the trial court refusing their offer of proof of a discovery within the limits of the Eulalia made through the underground workings of the Little

Vinnie claim. In the original opinion no special reference was made to this position, because the radical defects in appellants' [48] proof, as shown by their offer and by the record, did not seem to us to call for an application of the rules of law invoked. Further investigation, particularly in the light of the oral arguments on this rehearing, clearly demonstrates the fallacy of this claim. As we have already determined, appellants' location of the Eulalia has no standing at all, if based upon a former discovery made in 1879, or upon the one alleged to be made in May, 1893, at the time they went upon the ground and made their location, and which is admitted to be in the wash which covers the side of the mountain. At the trial, though no such claim is made in the complaint, there was an attempt to show a valid discovery made from the adjoining Little Vinnie lode. When the trial court ruled that a valid discovery could not be made from an opening on another claim or government land, it was error, but in view of the facts on which appellants themselves admit their present contention is founded, such ruling was not prejudicial for the reasons which we now state. If it be granted that such a discovery was made, appellants wholly failed to follow it up by doing the other essential things which we said in Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309, 53 L. R. A. 793, should be done in order to perfect an underground discovery.

This underground discovery is said to have been made between the months of September and December, 1894. If so, we fail to see how it can avail the appellants, for earlier in the year of 1894 the appellee, as the jury must have found, and as the evidence abundantly shows, made a valid discovery in the old Pocket Liner shaft within the present boundaries of the Golden Rod location. This discovery, as well as the location based upon it, is prior to that of appellants, whether or not the law requires in such circumstances an amended, or additional, location certificate to be filed. If the law does not require such filing, appellee's [49] location of the Golden Rod is superior to the Eulalia, for the former is first in point of time; but if such location certificate must be filed, still appellee must prevail, for appellants have never filed such certificate at all, and appellee, in March, 1895, filed its amended location certificate in which it bases its location upon the discovery made in the Pocket Liner shaft. It therefore conclusively follows, according to the facts as appellants themselves on the oral argument admit them to be, that there was no prejudicial error on the part of the

trial court in rejecting appellants' offer of proof of a subsequent underground discovery, since, if it was made, it was not until after appellee had made a valid discovery, and perfected its location, of the Golden Rod.

3. Section 188a of Mills' Annotated Code declares that in a suit like the one at bar it shall be the duty of the court at the trial, upon application of either party, to send the jury impaneled in the case in a body to view and inspect the premises. At the trial below, the plaintiffs made such application. Whether they complied with other provisions of the same statute as to advancing the expenses which a compliance with the request involves, we do not pause to inquire; for the assignment attacking the ruling denying the request may be disposed of on more satisfactory grounds. In Connolly v. Hughes, 18 Colo. App. 372, 71 Pac. 681, our court of appeals, assuming that the provision of the statute was mandatory, held that it did not apply to a case, such as was then before the court, where the party making the request had not introduced any evidence to establish his case. We think that ruling was right, and the principle applies to this case. Although the plaintiffs here did introduce evidence to establish the validity of their title, they wholly failed to make out a case for submission to the jury.

50 We may fitly observe that appellants, in insisting upon their right to have the jury inspect the Pocket Liner shaft for the purpose of enabling it to discover whether or not a vein of mineral was disclosed therein, are so inconsistent with another, though not the sole, claim made by them, namely, that the validity of their own location depends upon a former discovery made in the same shaft in 1879, that their supposed grievance at this ruling of the court does not impress us as meritorious. It would seem to be altogether useless to send the jury to inspect the premises for the purpose of enabling them to determine whether or not a vein is disclosed in the Pocket Liner shaft, when the parties making such request, as to one branch of their case, rested the validity of their own location upon its existence.

4. In the oral argument counsel for appellants conceded that, if it was not necessary for appellee to post a new notice at the point of the second and valid discovery of the Golden Rod vein in the Pocket Liner shaft made early in 1894, which the amended location certificate of the appellee recited, the Golden Rod location is superior to the Eulalia. In the case of the

Treasury Tunnel Min. etc. Co. v. Boss, 32 Colo. 27, ante, p. 60, 74 Pac. 888, decided at this term, we have substantially held that such posting was not necessary under such facts as exist here.

5. We desire further to say that the statement in appellants' petition that we have not applied the same principles of law to the location of these two claims, in so far as they are based upon the discovery of mineral in the Pocket Liner shaft, is incorrect. The facts attending the two locations are not the same, as we have already said; hence, the rule applicable to the one case is not the same that governs the other. The locators of neither lode posted at the point of discovery in the Pocket Liner shaft location [51] stake or notice, but the location of the Golden Rod, resting upon the discovery of the Pocket Liner shaft, is not only earlier in point of time, but its locators filed, and had recorded, an amended location certificate basing the location upon such discovery; while the locators of the Eulalia have never filed but one location certificate, and therein the statement is that the location is based upon a discovery which appellants now admit is invalid because it is in the wash on the mountain side.

The petition for rehearing is denied, and the former opinion adhered to.

The Validity of the Location of a Mining Claim **depends primarily upon the discovery of a vein or lode within its limits: Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92. The case of Treasury Tunnel Min. etc. Co. v. Boss, 32 Colo. 27, ante, p. 60, which is cited in the principal case, holds that as against another and subsequent location, a prior lode claim is good, in locating which all statutory requirements have been complied with, except the mere failure to place a discovery notice upon the ground at the point of the only valid discovery made on the claim, if such notice was posted at the point of a former but invalid discovery, as recited in the recorded location certificate, and if the boundaries remain the same after as before the true discovery.**

OVERLAND COTTON MILL COMPANY v. PEOPLE.

[32 Colo. 263, 75 Pac. 924.]

JUDGMENTS—Abatement by Death.—A judgment against a person upon his conviction for a crime is abated by his death, and cannot be enforced against his personal representative. (p. 75.)

CRIMINAL TRIALS—Affidavits—Evidence.—Whether an affidavit to support an information states the facts required by statute must be determined by the affidavit itself. Its statements cannot be attacked by extraneous evidence, nor upon the ground that the testimony may disclose that the person who verified it did not have the knowledge relative to the offense charged which the statute requires. (p. 75.)

CORPORATIONS—"Persons"—Penal Statute.—In a penal statute intended to inhibit an act, the word "person" prima facie includes corporations if they are within the spirit and purpose of the act. (pp. 76, 77.)

CORPORATIONS—Penalties.—A statute prohibiting the employment of children under a certain age in mills and factories, and providing a penalty for its violation, applies to corporations, and the fact that it provides for imprisonment if the fine imposed is not paid does not exempt corporations from the penalty, as the fine may be collected through the means provided for the collection of a money judgment. (p. 77.)

CORPORATIONS—Penalty—Liability for Act of Agent.—If a corporation, by its agent having authority to employ and discharge servants, violates a penal statute in employing a child under the prohibited age, the corporation is guilty and liable for the penalty provided by the statute, although it has instructed its agent not to employ children who are under the prohibited age. (p. 77.)

CORPORATIONS—Liability for Act of Agent.—A corporation is liable for the act of its agent, done within the scope of his general authority, although such act is forbidden by the corporation. (p. 77.)

CORPORATIONS—Knowledge of Agent.—An agent of a corporation is presumed to have that knowledge of its affairs particularly under his control which, by the exercise of due diligence, he would have ascertained. (p. 78.)

CORPORATIONS—Penalties—Liability of Agent.—If a statute prohibits the employment of children under a certain age in mills, and imposes a penalty for its violation, the assistant superintendent of a mill, with authority to employ and discharge servants is presumed to have known that a minor under the prohibited age was employed in the mill, if such was the case, and hence such superintendent may himself be held guilty of having violated the statute. (p. 78.)

CORPORATIONS—Liability of Agent for Criminal Offense.—An agent or officer of a corporation, through whose act it commits an offense against the law, is himself also guilty of the same offense. (p. 78.)

T. H. Hood, for the appellant.

N. C. Miller, attorney general, and I. B. Melville, for the people.

[265] GABBERT, C. J. Each of plaintiffs in error was found guilty of violating the provisions of section 413 of 1 Mills' Annotated Statutes. This section provides, in substance, that any person who shall hire and employ a child under fourteen years of age in any mill or factory, shall be guilty of a misdemeanor. The affidavit supporting the information charged that the Overland Cotton Mill Company, John L. Jerome, as its treasurer, and Dean Sutcliffe, as its superintendent, had violated this statute by employing a boy under fourteen years of age in the mill belonging to the company.

Since the cause was brought here, plaintiff in error, Jerome, has died. The purpose of enforcing a penal statute is to punish the person found guilty of violating its provisions. The representatives of deceased are not responsible for the alleged violation of the statute by him during his lifetime. They cannot be required to satisfy the judgment rendered against him. It is only the person adjudged guilty who can be punished, and a judgment cannot be enforced when the only subject matter upon which it can operate has ceased to exist. As to the deceased, the proceedings are abated by operation of law: O'Sullivan v. People, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143; Town of Carrollton v. Rhomberg, 78 Mo. 547; March v. State, 5 Tex. App. 450; Herrington v. State, 53 Ga. 552; United States v. De Goer, 38 Fed. 80; Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. Rep. 423, 28 L. ed. 65.

During the progress of the trial it developed from the testimony that the party who made the affidavit supporting the information did not have personal knowledge that the defendants had committed the offense charged. Thereupon they moved to quash the information. The motion was denied. There was no error in this ruling. Whether or not an affidavit [266] to support an information states the facts required by the statute, must be determined from the affidavit itself. Its statements cannot be attacked by extraneous evidence, or upon the ground that the testimony may disclose that the party who verified it did not have the knowledge relative to the offense charged which the statute requires: Bergdahl v. People, 27 Colo. 302, 61 Pac. 228; Holt v. People, 23 Colo. 1, 45 Pac. 374.

The Overland Cotton Mill Company is a corporation organized under the laws of this state, and it is argued that, be-

cause the statute only says that "any person" who shall employ children under the age of fourteen years in any mill or factory shall be deemed guilty of violating its provisions, that, therefore, a corporation, in its capacity as such, cannot be reached in a prosecution of this character. In other words, because the statute does not specify corporations, that they are exempted from the statutory provision on the subject of the employment of children under the age of fourteen years. In support of this contention, attention is directed to the provision that the officer to whom a warrant is issued against the person charged with violating the statute shall bring that person into court, and that such person, if found guilty, shall be committed to jail if the fine imposed is not paid; that other provisions in the chapter relating to children in which the section under consideration appears, expressly include corporations; that a corporation cannot be imprisoned, and that the act can be amply enforced by proceeding against the employés of corporations who violate it. These matters may be taken into consideration in ascertaining whether or not corporations are included, but they are not conclusive, nor do they furnish the true test in determining whether or not the word "person," as employed in the statute, embraces a corporation. In the earlier cases, and before corporations [267] become such important factors in industrial affairs, it was held that as statutes imposing a penalty were to be strictly construed, they did not apply to corporations, unless they included them in express terms or by clear implication. This view is no longer entertained by the modern decisions, either in England or this country, for various reasons, among which may be noticed that it ignored the principle that statutes are to be applied to corporations, when they can be, the same as to natural persons; that so far as their nature will permit, they are amenable to the laws of the land the same as individuals; and that to exempt them from the operation of a statute would result in conferring upon them rights which natural persons were not permitted to enjoy: 10 Cyc. 1208. Prima facie, the word "person," in a penal statute which is intended to inhibit an act, means "person in law"; that is, an artificial, as well as a natural, person, and therefore includes corporations, if they are within the spirit and purpose of the statute: Pharmaceutical Assn. v. London etc. Assn., Ltd., 5 App. Cas. 857; 7 Ency. of Law, 2d ed., 841; 1 Clark & Marshall's Private Corporations, sec. 252; Bishop's Statutory Crimes, 3d ed., sec. 212; Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 60 Am. Rep. 786, 32 N. W. 275.

Whether corporations are included within the statute depends largely upon its object: Pharmaceutical Assn. v. London etc. Assn., Ltd., L. R. 5 App. Cas. 857. The purpose of the statute, as indicated by its title, was to prohibit the employment of children under fourteen years of age in certain kinds of work. It is common knowledge that the places which, by the statute, children under the age of fourteen years are inhibited from working in, are operated largely by corporations. Whether such places were operated by individuals or corporations could make no difference with respect to the employment for it would be just [268] as detrimental to the child in one instance as in the other. If corporations are exempted from the act, then the purpose of the legislature, in inhibiting the employment of children under a certain age in certain kinds of work, would not be accomplished. Corporations, therefore, are clearly within the spirit and purpose of the statute, because its ultimate object was to prevent children under a given age from being employed in specified work.

That the statute provides for imprisonment if the fine imposed is not paid, is not an objection which a corporation can urge against its enforcement. True, the corporation cannot be imprisoned, but the fine can be collected through the means provided for the collection of money judgments: Commonwealth v. Pulaski Agr. Assn., 92 Ky. 197, 17 S. W. 442.

It is next urged that, because instructions were issued to the subordinate officers of the company not to employ children under the age of fourteen years, that the corporation is not liable for the violation of the statute by its employés. A corporation can only act through its agents. Their acts, within the scope of their authority, are the acts of the corporation. The official who employed, or is responsible for the employment of, the child on account of whom the prosecution was commenced, had general authority to engage employés. It is immaterial that he may have been instructed not to employ children under the age of fourteen years, for, by engaging the boy under a general authority with respect to hiring employés, he became the employé of the company, and the latter is not relieved from the consequences of this act merely because its duly authorized agent may have disobeyed specific instructions. In short, a corporation is responsible for the acts of its servants of the character under consideration, when done within the scope of their general authority, although forbidden [269] by the corporation: State v. Railroad Co., 91 Tenn. 445, 19 S. W. 229; Railway Co.

v. Ryan, 56 Ark. 245, 19 S. W. 839; 2 Wood's Railway Law, sec. 337.

On behalf of the defendant, Dean Sutcliffe, it is contended that the evidence was not sufficient to justify his conviction. An agent of a corporation is presumed to have that knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have ascertained: 21 Ency. of Law, 896; People v. McClure, 27 Colo. 358, 61 Pac. 612. A Mr. Cumnock was the general superintendent in charge of the mill. He had charge of the hiring of employés. Mr. Sutcliffe was the assistant superintendent, acting for and under the authority of Mr. Cumnock. He was engaged at the mill, and in the performance of his duties had the authority to hire and discharge employés. It thus appears from the testimony that, by reason of his relationship to the company, and the performance of his duties, that he either knew, or, by the exercise of due diligence upon his part, should have known, that a minor under the prohibited age was in the employ of the company. For this reason, he must be held as having violated the statute, for it was within his power, by virtue of the relationship he bore to the company, to have prevented the employment. An officer of a corporation, through whose act the corporation commits an offense against the laws of the state, is himself also guilty of the same offense: People v. White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

In conclusion, it is but just to remark that the record clearly shows that there was no willful violation of the law. On the contrary, it appears that Mr. Jerome was solicitous that it should be observed. He had frequently instructed those charged with the duty of engaging employés to strictly observe its provisions. His duties did not require his presence at the mill but [270] occasionally. He had nothing to do with the hiring of employés. He had no knowledge that the boy was in the employ of the company. He certainly did all as an individual, or as an official of the company, to prevent the law from being violated, which could be required of him, and had his wishes and desires been carried out, the law would have been strictly observed. The boy had worked less than two months in the mill. The family of which he was a member had only recently moved to the state. They were in poor circumstances. The mother also worked in the mill, and the father contributed nothing to the support of his family, who appear to have been dependent upon their labor for a livelihood. These conditions

may have influenced Mr. Sutcliffe in permitting the boy to have employment. At most, his offense consisted of not strictly observing the law, rather than an intentional disregard of its provisions. On the whole, the case presented appears to have been one where the observance of the law could have been readily secured without resort to a prosecution. It is a benign one, but of a character where the circumstances may be such that discretion in resorting to a prosecution for its violation in the first instance can well be exercised, or, in case of conviction, judicial clemency extended, without in the least detracting from its efficiency. These considerations, however, are not sufficient to either excuse the corporation or Mr. Sutcliffe, and, as to them, the judgment of the county court will stand affirmed. As to the deceased, the judgment is abated.

The Criminal Liability of a principal for the acts of his agent is discussed in the monographic notes to Franklin Fire Ins. Co. v. Bradford, 88 Am. St. Rep. 797-799; State v. Kittrelle, 28 Am. St. Rep. 706-715. See, too, Hall v. Norfolk etc. R. R. Co., 44 W. Va. 36, 67 Am. St. Rep. 759. Generally, a corporation is answerable for the acts of its agents to the same extent and under the same circumstances that a natural person is chargeable with the acts of his agents: Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627. A corporation is a "person," subject to a penalty, within a statute prohibiting the sale of intoxicating liquors, and is liable for such a sale by its committee at a ball ordered by it: Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 60 Am. Rep. 786. And the word "person" in a statute making it a crime to obtain money or goods under false pretenses, includes artificial as well as natural persons: Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291. That a corporation may be indicted, see Delaware etc. Canal Co. v. Commonwealth 60 Pa. St. 367 100 Am. Dec. 570; Donaldson v. Mississippi etc. R. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; Louisville etc. R. R. Co. v. State, 3 Head, 523, 75 Am. Dec. 778.

BLAND v. PEOPLE.

[32 Colo. 319, 76 Pac. 359.]

CRIMINAL TRIALS—Using Docked Horse—Evidence.—In a prosecution for using an unregistered docked horse it is not necessary to a conviction to prove that the horse is not registered, if it clearly appears that the docking was done after the expiration of the time within which the animal might have been registered. (p. 81.)

CONSTITUTIONAL LAW—Police Power—Duty of Courts.—It belongs to the legislative department to exert the police power of the state, and to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health, or the public safety, and it is the duty of the courts to sustain such legislation unless it is clearly, palpably, and beyond all question in violation of constitutional provisions. (p. 84.)

CONSTITUTIONAL LAW—Police Power—Use of Docked Horses.—A statute prohibiting the use of any unregistered docked horse is valid as a reasonable exercise of the police power, and not in violation of any constitutional provision, state or national. (p. 84.)

CONSTITUTIONAL LAW—Police Power—Docking Horses.—It is within the police power of the state to prohibit cruelty to animals, and within this rule the docking of a horse's tail is cruelty. (p. 88.)

CONSTITUTIONAL LAW—Police Power.—In the exercise of the police power the legislature may adopt reasonable means necessary to accomplish the purposes of the statute. (p. 88.)

CONSTITUTIONAL LAW—Police Power.—All property is held under the implied obligation that the owner's use of it shall not be injurious to the public, and to this end such use may be regulated by the exercise of the police power of the state. (p. 88.)

CONSTITUTIONAL LAW—Police Power—Use of Docked Horses.—A statute prohibiting the use of any unregistered docked horse is a valid exercise of the police power, and not objectionable as class legislation, nor as denying to any person the equal protection of the law. (p. 89.)

CONSTITUTIONAL LAW—Creating Crime and Providing Punishment.—It is competent for the legislature to provide such punishment as in its judgment the offense made criminal by statute warrants, and unless the punishment inflicted can be regarded as cruel or unusual, the courts cannot interfere. (pp. 89, 90.)

CONSTITUTIONAL LAW—Docking Horses—Punishment.—In a statute forbidding the docking of horses' tails, and prohibiting the use of unregistered docked horses, the latter prohibition may be regarded as an additional punishment imposed upon those who violate the statute, and as such is a valid exercise of the police power of the state. (p. 90.)

Cranston, Pitkin & Moore, for the appellant.

N. C. Miller, attorney general, and I. B. Melville, for the people.

[221] STEELE, J. The information charges that the defendant on, to wit, May 1, 1902, at the county of Arapahoe, Colorado, did unlawfully drive, work and use an unregistered docked horse. Section 1 of the statute under which the information is brought, is as follows: "It shall be unlawful for any person or persons to dock the tail of any horse within the state of Colorado, or to procure the same to be docked, or to import or bring into this state, any docked horse, or horses, or to drive, work, use, race or deal in any unregistered docked horse or horses within the state of Colorado."

Section 2 provides that, "within ninety days after the passage of this act, every owner or user of any docked horse within the state of Colorado, shall register his or her docked horse, or horses, by filing in the office of the county clerk and recorder of the county in which such docked horse or horses may then be kept, a certificate, which certificate shall contain the name or names of the owner, together with his or her postoffice address; a full description of the color, age, size and the use made of such docked horse or horses; which certificate shall be signed by the owner or his or her agent. The county clerk shall number such certificates consecutively, and record the same in a book or register, to be kept for that purpose only; and shall receive, as a fee for the recording of such certificate, the sum of fifty cents": Laws 1899, c. 93.

The defendant sold the horse in question February 19th, and bought him back about the 1st of March, 1902. The horse's tail was docked between [222] the last-mentioned dates, and there is no evidence showing that the defendant docked the horse, or that he had possession of the horse at the time, or was in any way involved in the commission of the offense of docking the horse's tail. No proof was offered that the horse was unregistered, but the court held that, as the proof clearly established the fact that the offense of docking the horse's tail was committed some time between February 19th and the first week in March, 1902, no proof of nonregistration was necessary. This ruling was correct. The act was approved in April, and became a law in July, 1899, and requires registration within ninety days after the passage of the act. It follows that registration under the act was impossible in this case. The very purpose of the legislature was to exempt from the operation of the statute those owning docked horses at the time of the passage of the act, and to secure them such exemption it was provided that they might, within ninety days from the passage of

the act, register their horses. Owners of horses who did not avail themselves of the privilege of registration, and those who could not take advantage of the act, are guilty of a violation of the statute if they drive, work, use, race or deal in any unregistered docked horse. Although we hold that proof that the horse was not registered was not required in this case, it does not follow that such proof would not be required in a case where it appeared that the horse was docked while in this state, prior to or within ninety days after the passage of the act.

The defendant contends that the act in question violates the fourteenth amendment to the constitution of the United States, and section 3, article 2, of our constitution, which provide, respectively, that "No state . . . . shall deprive any person of life, liberty or property without due process of law, nor 323 deny to any person within its jurisdiction the equal protection of the laws"; and that "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right . . . . of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

It is not asked that the whole act be declared unconstitutional, but that portion only which forbids the driving, working or using of any unregistered docked horse—registration being impossible.

Concerning the police power of the state, Mr. Justice Miller said, in the Slaughter-House cases, reported in 16 Wall. 36, 21 L. ed. 394: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." And, quoting from an opinion by Chief Justice Redfield of Vermont, he continues: "'It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the states, ... and persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'"

And this court, In re Scrip Bill, 23 Colo. 504, 48 Pac. 512, said: "While it is difficult to define the boundaries of the police

power, it admittedly extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."

And in the case, Waters v. People, 23 Colo. [324] 33, 58 Am. St. Rep. 215, 46 Pac. 112, 33 L. R. A. 836, it was held, that "The killing of doves as they are released from a trap, merely to improve skill in marksmanship, or for sport and amusement, though without specific intent to inflict pain or torture, is within the inhibition of the statute, and punishable." In the course of the opinion, it was said: "It is of common knowledge that, within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states, having the common object of protecting these dumb creatures from ill-treatment by man. Their aim is not only to protect these animals, but to conserve the public morals, both of which are undoubtedly subjects of legislation."

The docking of a horse's tail is cruelty, not only because of the torture inflicted by the operation, but because, by depriving the horse of the use of his tail, he is deprived of the use of a weapon supplied him by nature for his protection from the myriads of winged pests that infest the land. Counsel insist that the question of cruelty is not involved, and that, assuming that the legislature has full power to prohibit docking, it has not the power to prohibit the use of the horse, after his tail has been docked; and, conceding that the use of property may be taken away for the public good, without compensation to the owner, that the prohibition of the right to drive, work and use an unregistered horse does not tend to the protection of the health, comfort or good morals of the community, and is not, therefore, a valid exercise of the police power. They say that, as the act itself is silent upon the subject of the purpose of the legislature in prohibiting the use of docked horses, unless we can clearly perceive from the terms of the act that [325] the thing prohibited necessarily affects the public morals, we should not sustain it; that the sight of docked horses does not call to mind the process by which the tail was obliterated; that there is no difference in appearance between a registered and an unregistered docked horse; and that a docked horse is not an unsightly object. That whether the statute can or cannot be justified as an exercise of the police power, is a judicial, and not a legislative, question.

It belongs to the legislative department to exert the police power of the state, and to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health or the public safety: Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205.

"The public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the constitution": Atkin v. Kansas, 191 U. S. 223, 24 Sup. Ct. Rep. 124, 48 L. ed. 158.

It is said that the police power of the state is founded largely upon the maxim: "Use your property in such manner as not to injure that of another"; and counsel insist that the driving of an unregistered docked horse injures no one, and that as the police power is founded upon the maxim stated, unless the use of an unregistered docked horse can be shown to be injurious to others, the statute cannot be sustained as a valid exercise of the police power. "The welfare of the people is the supreme law," is a maxim of the law; and it is upon these two maxims that the police power of the state is largely based. In the exercise of the police power, the legislature has a large discretion, and it is our duty to sustain such legislation unless it is clearly and palpably and beyond all question in violation of the constitution.

[326] The fact that the legislature has failed to state that the use of an unregistered docked horse is in its opinion contrary to the public morals does not preclude us from sustaining the statute upon that theory, for we must sustain the law if any sound and reasonable theory can be advanced as a basis for our judgment. It is urged by the attorney general that the legislation in question can be sustained under the police power of the state, because it tends to conserve the public morals; that seeing frequently the mutilated and disfigured animals sears the conscience and hardens the minds of the people, until they become accustomed to look upon these things as a matter of course. The same thought was expressed by Pope in a few lines. And it is as true in our day as it was in his time, that although we may instinctively hate vice, yet if we allow ourselves to become familiar with it, we, in turn, become depraved. It was upon this theory that Judge Carpenter sustained the law, and we fully agree with him that constantly seeing the disfigured and mutilated animals tends to corrupt the public morals.

We are of opinion that, in forbidding the use of a docked horse, the legislature has not exceeded its authority; that the interdiction is a reasonable and valid exercise of the police power of the state; and that the provisions of the federal and the state constitutions have not been violated. The questions here presented have been considered in very many cases by the supreme court of the United States. We shall not undertake a review of these decisions, but shall cite from a few of the more recent ones which, in our opinion, clearly sustain the right of the legislature to enact such statutes as the one now assailed.

The legislature of Kansas declared all places where intoxicating liquors were manufactured or sold to be common nuisances and that, whenever by the [327] judgment of the court, such place was found to be a nuisance, the sheriff should be directed to shut up and abate such place, and destroy all property used in keeping and maintaining such nuisance. One Mugler, at the time of the passage of the act, was the owner of a brewery, and engaged in the manufacture of malt liquors. The sale of which he was found guilty occurred in the state after the act took effect, and was of beer manufactured before its passage. The buildings and machinery constituting the breweries were of little value if not used for the purpose of manufacturing beer. It was claimed by Mugler that the judgment of the court sustaining the statute and directing the destruction of his brewery deprived him of his property without due process of law. The law was upheld by the supreme court in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; Mr. Justice Harlan, in the course of the opinion, said: "If, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquor, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized."

Respecting Mugler's claim that his property, if not employed in the manufacture of beer, would be of no value, and that the prohibition of it being so employed was, in effect, a taking

of the property for public use without compensation, and depriving the [328] citizen of his property without due process of law, Justice Harlan said: "This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. . . . . The principle, that no person shall be deprived of life, liberty or property without due process of law, was embodied, in substance, in the constitutions of nearly, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in the country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Letters patent granting to Henry C. De Witt and assigns the exclusive right to make, use and vend to others an article known as Aurora Oil were issued in 1867. By a statute of Kentucky, passed in the year 1874, the sale or use of oil that would ignite or permanently burn at a less temperature than 130° Fahrenheit was prohibited. The statute further provided that inspectors were required to brand casks and and barrels containing oil, with the words "standard oil," or with the words "unsafe for illuminating purposes," as inspection showed was proper. The assignee of De Witt was convicted on the charge of selling oil known as Aurora Oil, the cask containing which had been previously branded by an authorized inspector with the words "unsafe for illuminating purposes." It was admitted that the Aurora Oil could not be made to conform to the standard of test required by the Kentucky statute as a prerequisite to the right to sell within that state illuminating oils [329] of the kind designated. In the case Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, the conviction was sustained and the law upheld. The court said: "By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community, against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination mani-

festly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the state that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the state is wise or unwise, it is not the province of the national authorities to determine. That belongs to each state, under its own sense of duty, and in view of the provisions of its own constitution. Its action, in those respects, is beyond the corrective power of this court."

In Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989, it is held that "All rights are subject to the police power of a state, and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience; and that as the police power of a state extends to the protection of the lives health, and property of her citizens, the maintenance of good order, and the preservation of the public morals, the legislature cannot, by any contract, [330] devest itself of the power to provide for these objects."

In Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385, it is said: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. . . . . Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." And the court upheld the New York statute authorizing the summary destruction of nets set or maintained on the waters of the state in violation of the statute enacted for the protection of fish. At page 142 of 152 U. S., the court says: "It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice and other articles used

for gambling purposes, are perfectly harmless in themselves but may become nuisances by being put to an illegal use, and in such case fall within the ban of the law and may be summarily destroyed." And on page 140 of 152 U. S., the court says: "While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed."

[331] Mr. Justice Brown, in the case Louisville etc. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. Rep. 714, 40 L. ed. 849, said: "Where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained wherever it can be done without the impairment of vested rights. The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within the exertion of legislative control; and in the exertion of such power the legislature is vested with a large discretion, which if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

The foregoing authorities establish: 1. That it is within the police power of the state to prohibit cruelty to animals, because such prohibition is a protection to the animals and tends to conserve the public morals; 2. That in the exercise of the power the legislature may adopt such reasonable means as is necessary to accomplish the purposes of the statute; 3. That to the legislature is confided a large discretion in declaring the public policy, and that, unless the legislation is clearly and palpably in violation of the fundamental law, it will be sustained; 4. That all property is held under the implied obligation that the owner's use of it shall not be injurious to the public.

These propositions being established by abundant authority, it remains to be determined whether the means adopted by the legislature for the accomplishment of the purpose of preventing the species of cruelty forbidden by the statute can be regarded as a reasonable exercise of the power confided to the legislature. It is for the courts to determine whether the act can be justified as a reasonable exercise of [332] the police power, but in the consideration of the question we should be guided somewhat by the primary declaration of the legislature; and if, in its judgment, it is necessary, for the conservation of

the public morals and to effect the purposes of the act, to prohibit the use of docked horses, we should not disregard the determination by the legislature of that question. It is not a valid objection to the statute that only such horses as are not registered cannot be used. The legislature recognized the fact that many horses had been mutilated prior to the time the bill for the prevention of the cruel custom was introduced, and, instead of depriving the owners of the right to use such animals, justly provided that horses then docked might be used, provided they were registered within a certain time. At this time there was no law prohibiting the docking of horses' tails, and to have prohibited the use of docked horses would have been an unusual if not an illegal exercise of power. The defendant cannot complain if he comes under the ban of the law, even though means have been provided for other owners of docked horses to use their animals. The law excludes from its provisions those who use registered horses and includes those who use unregistered horses. All persons who owned docked horses at the time of the passage of the act were permitted to register them. Horses docked after the passage of the act are denied registration. The law operates upon that class of persons who use unregistered docked horses, but the classification is reasonable and not arbitrary, and is not objectionable as class legislation, and does not violate that provision of the constitution which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The character of the offense prohibited by the statute is such that something more than the mere prohibition [333] of the docking was necessary to accomplish the purposes of the act, and the means employed by the legislature are probably the most efficient that could be devised to prevent the docking. The whole scheme and purpose of the act would probably fail if the use of the docked animals were not prohibited, and as the act is clearly intended to conserve the public morals and to protect the horses, and as the means employed by the legislature to effectively prevent the cruelty prohibited by the statute are reasonable and consistent with the policy of the state as declared by the act, and are measures necessary for the protection of the interests of the public, it becomes our duty to uphold the statute. But, for another reason, the law can and should be sustained. It is competent for the legislature to provide such punishment as in its judgment the offense warrants; and, unless the punishment inflicted can be regarded as cruel or un-

usual, the courts cannot interfere. Although the statute expressly fixes the penalty for its violation as fine and imprisonment, or both, we know of no good reason why the provisions forbidding the use of unregistered docked horses may not be regarded as an additional punishment imposed upon those who violate the law. Counsel say the deprivation of the use of the unregistered docked horse was not imposed as an additional punishment upon the person who docked the horse, because the horse may have been docked in a state where the docking of horses' tails is not a crime, and brought here; and because if a burglar should break into a stable and steal a horse and then dock his tail, the owner, if he subsequently recovered his property, could not use his horse. The statute forbids the importation of docked horses. Whether that provision interferes with the right of Congress to regulate commerce between the states is not involved in this case for the reason that the horse [334] in question was docked in Colorado. What our ruling would be in a case where a thief had docked a stolen horse and the rightful owner had undertaken to use him after he was docked, we are not prepared to say; but the horse in question was not a stolen horse, nor was it docked by a thief. With full knowledge of the law the owner of the horse docked him and sold him to Bland, and Bland, with full knowledge of the law, bought a docked horse. Their property has not been taken without due process of law. The law has not destroyed their property; they have destroyed their own property. Bland sold the horse and within two weeks bought him back; in the interim the horse's tail was docked. There was no necessity for docking the horse's tail, and the parties concluded to defy the law, and they must take the consequences.

We regard the law as just, wise and humane, and withal a lawful exercise of the power confided to the legislature, because it conserves the public morals and because it punishes the cruel and senseless treatment by man of his best and most constant friend.

The judgment is affirmed.

Acts Which may be Declared Criminal **is the subject of a monographic note to Booth v. People, 78 Am. St. Rep. 235-274.**

BESSEMER IRRIGATION DITCH COMPANY v. WOOLLEY.

[32 Colo. 437, 76 Pac. 1053.]

EQUITY JURISDICTION—Injunction—Quieting Title.—If one of the objects of an action is to enjoin interference with the use of water rights, this is sufficient to give a court of equity jurisdiction, and having obtained jurisdiction of the subject matter for that purpose, it may decide all the questions involved and grant appropriate relief, even to entering a decree quieting plaintiff's title without proof of his possession. (p. 92.)

WATER RIGHTS, Although They may be Appurtenant to Land, are the subject of property, and may be transferred, either with or without the land. (p. 93.)

WATER RIGHTS—When Pass by Deed.—Whether a water right passes as an appurtenance to the land, granted by deed silent as to such water right, depends upon the intention of the grantor, to be ascertained from the circumstances, and whether such right is or is not incident and necessary to the beneficial enjoyment of the land, and in the absence of such showing the water right does not pass as an appurtenance to the land. (p. 94.)

PLEADING.—A Defective Special Denial does not control a good general denial, and a good general denial of each and every allegation of a complaint, not expressly admitted, puts in issue all other allegations, although some of them are impliedly admitted by the defective special denial. (p. 95.)

WATER RIGHTS—Conveyance of by Deed—After-acquired Property.—If the habendum clause in a trust deed does not purport to grant any after-acquired property, but merely confirms in the grantee any estate or title in and to the lands specifically granted which the grantor might thereafter acquire, it cannot operate to convey a water right afterward acquired and applied to the land conveyed. (p. 96.)

APPELLATE PRACTICE—Assignment of Error—Waiver of Objection to Decree.—One party cannot, on appeal, object to a decree in the lower court in favor of the other party on the ground that the latter did not by his answer set up any cross-complaint nor ask for any affirmative relief, when such objection was not made in the court below, and no cross-errors are assigned on appeal. (p. 97.)

Devine & Dubbs, for the appellant.

Teller & Dorsey and M. J. Bartley, for the appellees.

439 CAMPBELL, J. Action to enjoin interference with irrigating ditches and water rights.

The subject matter of the controversy is the Cape Horn Ranch Ditch and the Wheel Ranch Ditch and their accompanying water rights. The general purpose of the action is twofold: to enjoin the defendant from using the same, and to quiet

plaintiffs' title, and the complaint contains every allegation that would be necessary in a bill to quiet title to these properties and to enjoin wrongful use of them. The [440] answer alleges possession and ownership in defendant and asks to have the action dismissed. The court quieted title in plaintiffs as to the Cape Horn Ranch Ditch and enjoined defendant from making use of it, and as to the Wheel Ranch Ditch quieted title in defendant and restrained plaintiffs from interfering therewith. Charles Cecil Campion is the common source of title. The plaintiffs claim as purchasers at a trustee's sale of lands to which, they say, the ditches and water rights are appurtenant, which sale was conducted under a foreclosure of a trust deed executed by Campion to the trustee to secure the indebtedness of the grantor. The defendant claims title to the ditches and water rights, separate from the lands, under a subsequent grant direct from Campion specifically describing them.

The first point made by the appellant (defendant below) is that plaintiffs did not show possession, and as this action was brought under section 255 of the code, which requires that the plaintiff be in actual possession when the suit begins, the action fails. The plaintiffs (appellees here) say that their allegation of possession in the complaint was not denied. In this they are mistaken, for the answer specifically alleges ownership and possession in the defendant, and this, in effect, is a denial of possession in plaintiffs, hence they were put upon their proof. If this were merely an action to quiet title, and nothing else, it might be, under our former decisions, that this lack of proof would be fatal to plaintiffs' case, but we cannot say that this was even the principal object of the suit. One, if not its principal, object was to enjoin defendant from interfering with plaintiffs' use of water rights. The court certainly had cognizance of this as an independent ground of equitable jurisdiction, and having obtained jurisdiction of the subject matter for this purpose, was at liberty to decide all of [441] the questions in the case and grant appropriate relief. In Gutheil Park Inv. Co. v. Town of Montclair, 32 Colo. 420, 76 Pac. 1050, decided at this term, the same question was raised and passed upon and the reasons given for our conclusion, which need not be repeated here.

The trust deed and the trustee's deed contained a specific description of certain lands which the plaintiffs claim were the lands for the irrigation of which the water rights in question were originally appropriated and for which they had been con-

tinuously used and to which they became appurtenant, and were directly necessary and essential to the full enjoyment thereof, and without which the lands in question would be of little, or no, value. Neither in the granting clause, nor elsewhere in these instruments, were these water rights or ditches, as such, described, or in any way referred to. Plaintiffs (appellees here), however, maintain, and this is the main question in the case, that since the deeds were silent respecting the water rights and no reservation thereof was made by the grantor, the ditches and water rights necessarily passed as appurtenances to the lands which were specifically described in the instruments of conveyance. In support of this contention, they cite a number of cases from courts of the so-called arid states, where the doctrine of appropriation prevails, as well as from the states where the common-law rule of riparian ownership obtains, to the effect that a grant of a principal thing, in the absence of an express exception or reservation in the instrument of conveyance, perforce carries with it as an appurtenance whatever is in existence at the time and is directly necessary and essential to the principal thing granted.

It is unnecessary to dwell upon these cases. Learned counsel for plaintiffs are surely not unaware that this court has repeatedly announced a different [442] rule for this jurisdiction, although in their briefs counsel ignore them, and apparently suppose that their comment upon the authorities of our sister states and their elaborate discussion of the proposition will lead this court to overturn its own previous decisions. The rule was first clearly announced by Mr. Justice Goddard in Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355, in this language: "Although a water right may be appurtenant to the land, it is the subject of property and may be transferred either with or without the land: Strickler v. City of Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313. Being, therefore, a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether such right is or is not incident to and necessary to the beneficial enjoyment of the land."

This case was followed in Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac.

1020; Daum v. Conley, 27 Colo. 56, 59 Pac. 753; King v. Ackroyd, 28 Colo. 488, 66 Pac. 906; and is now stare decisis with us. We are satisfied with it and again approve it. In the opinion in Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788, was cited Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025. Appellees place their main reliance apparently upon this case, which they say declares that, in the absence of a direct exception or reservation in a deed of lands in irrigating which water rights have been used, the water rights necessarily pass as an appurtenance. Our reference to the case was only to the point that a water right might, in certain circumstances, pass as an appurtenance. Whether or not it does pass in this state depends upon the intention of the grantor, which is to be ascertained [443] in accordance with the rule laid down in the Arnett case. In this connection it is not inappropriate to remark that in the Wyoming case the "entire property" of the mortgagor, both that then owned and all of the same kind thereafter acquired, was included in the mortgage, and the decision of the court might well have been put upon the ground that the proof showed that the mortgagor intended to pass the water rights with the land.

There was no evidence whatever on the trial below as to the intention of plaintiffs' grantors with reference to the water rights. The deed was entirely silent as to them. The intention of the grantor, then, must be gathered, if at all, from the circumstances of the case, and whether the water rights are, or are not, incident and necessary to the beneficial enjoyment of the land. In the absence of such showing we are constrained to say, upon the record now before us, that under the established doctrine in this state the water rights did not pass to plaintiffs as appurtenances to the lands which were the subject of the grant.

But appellees' counsel say that, though there was no evidence offered at the trial as to the intention of their grantor, there were in the complaint allegations of intention to convey the water rights, and that they were used upon, and were directly necessary and essential to the complete enjoyment of, the lands, and that these allegations are not denied by the answer, and therefore it was not necessary to introduce evidence to prove what was not denied. Some of the denials are a species of negative pregnant, others conjunctive denials of conjunctive allegations. In these respects the answer was faulty. A careful examination of its contents discloses, however, that, in addi-

tion to these defective denials, there was a general denial of each and every allegation of the complaint not theretofore specifically admitted, and there are affirmative allegations [444] in effect negativing these allegations of the complaint which plaintiffs insist were admitted. An admission that is involved in a denial which is nothing but a negative pregnant is certainly not a specific, and nothing more than an implied, admission. The general denial, therefore, put in issue everything not specifically admitted, and those allegations of the complaint we are now considering stand denied. A defective special denial does not control a good general denial: Porter v. Grady, 21 Colo. 74, 76, 39 Pac. 1091. The authorities are not unanimous as to whether a general denial of all allegations not otherwise admitted is good; but probably the weight of authority is in its favor: 1 Ency. of Pl. & Pr. 802 et seq.

If we believed that this answer was drawn for the purpose of evasion, or that its attempted denials were not made in good faith, we would be inclined to enforce the strictest rules of construction against the pleader; but we do not find indications of any such improper motive. If it is indefinite and uncertain what facts in the complaint are, and what are not, denied, the plaintiffs, by a motion to make more specific and certain, might have had the defects corrected: Bliss on Code Pleading, 3d ed., secs. 425, 331, 332. This was not done, and it would appear from the record that no objections on ground of defective denials were made or relied upon at the trial, but that, in this connection, the legal proposition which we have hereinbefore discussed was the one, and the only one, brought to the attention of the trial court. So that, notwithstanding the admitted imperfections of the denials of the answer, it was incumbent upon plaintiffs, by competent evidence, to establish the controverted allegations of the complaint as to the intention of their grantor, and the use, character and necessity of the alleged appurtenances, because such proof was essential to their cause of action.

[445] The Wheel Ranch Ditch was not in existence, and no appropriation of the water right used in connection therewith was made, at the time of the execution of the trust deed, though such ditch was constructed and water therefrom applied to the lands in question before the issuance of the trustee's deed. The court held that it was not the intention of the grantor in the trust deed to pass this ditch and water right as an appurtenance to the land, but that they passed by the deed

of conveyance from Campion to the defendant; hence title was adjudged to be in the defendant, and plaintiffs were perpetually enjoined from interfering with its use of the same.

The plaintiffs claim title to this subsequently constructed ditch and appropriated water right by virtue of the language of the habendum clause of the trust deed, which reads: "To have and to hold the same, with all the privileges thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, claim or demand in and to the same, either now or which may hereafter be acquired, unto the said grantee, his heirs and assigns." The appellees argue that this is equivalent to an after-acquired property clause, which is familiar in connection with mortgages, and cite the case of Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025, as authority for the proposition that this after-acquired property was impressed with the lien of the trust deed. In that case the intention of the mortgagor was to include its "entire property," both that in existence at the time and all like property thereafter acquired, and the intention was manifest in the granting clause of the mortgage. This habendum clause does not purport to be a grant of any after-acquired property, but merely to confirm in the grantee any estate or title in and to the lands specifically granted which the grantor might thereafter acquire. In other words, the grantor said that if he [446] should thereafter acquire any further estate or title in and to the lands conveyed, such future acquisition should inure to the benefit of the grantee. Authority for such construction is hardly necessary, but in Manning v. Smith, 6 Conn. 288, the court says: "It is the office of the habendum sometimes to enlarge the estate granted, but never to extend the subject matter of the grant." And in 2 Greenleaf's Cruise on Real Property, 349, it is said that "Nothing can be limited in the habendum of a deed which has not been given in the premises; because the premises being the part of a deed in which the thing is granted, it follows that the habendum, which is only used for limiting the certainty of the estate, cannot increase the gift; for in that case the grantee would in fact take a thing which was never given to him."

Appellees further object to the form of the decree quieting title to the Wheel Ranch Ditch in defendant, because the answer contains no cross-complaint, and does not ask for affirmative relief. Under the chancery practice, before the adoption of our code of procedure, a defendant seeking specific relief in a suit in chancery must do so by cross-bill, and must state the

grounds upon which he relies for affirmative relief with the same strictness required of the plaintiff in the original bill. The same practice, it is said, prevails under the code. In San Juan etc. Min. Co. v. Finch, 6 Colo. 214, 223, the court said that "a defendant who becomes pro hac vice complainant, must, in his cross-bill, set forth the grounds relied upon for affirmative relief with the same strictness as the complainant in his original bill"; citing Tucker v. McCoy, 3 Colo. 286. Appellees, however, are not in a position to complain of that part of the decree granting affirmative relief, even if, under an appropriate pleading with a proper prayer, it was wrong [447] to give it. Such objection seems not to have been raised below, and although plaintiffs excepted to that part of the decree, they have not assigned cross-errors here, though they have argued the point.

Our conclusion is that that portion of the decree of the trial court in favor of the defendant as to the Wheel Ranch Ditch and water right is correct and should be affirmed, and no further proceedings with reference thereto should be had. That part of the decree in favor of plaintiffs as to the Cape Horn Ranch Ditch and water right is wrong, and should be reversed. The cause is, therefore, remanded to the district court with instructions to vacate that portion of its decree adjudging title to such last-mentioned property to be in plaintiffs, and if further proceedings be had respecting the same, that they be in accordance with the views expressed in this opinion, and the parties may have leave to amend their pleadings as they are advised.

Whether Water Rights connected with land pass with a conveyance of the land as an appurtenance thereto is discussed in the monographic note to Scott v. Moore, 81 Am. St. Rep. 768-770. For further authorities on this question, see Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912; Jarvis v. Seele Milling Co., 173 Ill. 192, 64 Am. St. Rep. 107; Ulbricht v. Eufaula, 86 Ala. 587, 11 Am. St. Rep. 72. That there may be a sale of a water right separate from the land, see Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 71 Am. St. Rep. 123.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

DENEGRE v. WALKER.

[214 Ill. 113, 73 N. E. 409.]

TRUSTS—Ninety-nine Year Lease by Trustee.—Trustees authorized by a will to care for, manage, and rent city real estate, have power, under the direction of a court of chancery, to make a ninety-nine year lease of the property. (p. 99.)

JUDGMENTS—Persons not in Being—Ninety-nine Year Lease. Persons not in esse who may, on the happening of certain contingencies, become interested in a trust estate, may be bound by a decree which approves the making of a lease by the trustee for ninety-nine years, if persons in esse, whose interests are the same, are before the court and have their interests protected by the judgment. (p. 100.)

Appeal from a decree authorizing the trustees of the estate of a decedent to execute a lease of the property for a term of ninety-nine years.

David Quigg and J. A. Richardson, for the appellants.

Bentley & Burling, for the appellees.

[117] RICKS, C. J. We think the first clause of the will, which reads, "I direct my said trustees to care for, rent and manage my real property, to pay all taxes, assessments and insurance thereon, [118] and to make all necessary repairs, in their discretion," gave the trustees, under the directions of a court of chancery (if not without its aid), power to make the lease. A court of chancery has, to some extent, a general supervision over trust estates, and may direct such a disposition as in its discretion seems beneficial to all parties interested, even going so far as to order the sale of the trust estate and a reinvestment of the proceeds without authority being given by the will, if

the conditions are such that it is manifestly in the interest of the trust estate: Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776.

In the case of Marsh v. Reed, 184 Ill. 263, 56 N. E. 306, where a similar question arose, the court ordered the trustees to make a ninety-nine year lease although in direct contradiction of the limitation of the will, which provided "that no lease or demise shall be for a longer term or period than ten years," and on this question we said (184 Ill. 272, 56 N. E. 310): "The bill did not ask for interference with, nor does the decree in any manner interfere with, the design of the donor as to the devolution of the title to the trust property. The decree leaves the title to the property in the trustee, who remains charged with the duty to convey it in exact obedience to the wishes of the creator of the trust. The donor clothed the trustee with authority to rent the property and to collect the rents therefrom during the continuation of the trust, and in so doing placed a limitation upon the duration of any lease of the property to be made by the trustee. The effect of the decree is to enlarge the powers of the trustee in this respect, leaving the subject matter of the trust in all other respects unimpaired. In other words, the decree does not defeat the trust, but was entered upon the theory its provisions were necessary to carry into execution the design of the donor. The requirement that the leasing should be for periods not longer than ten years was no doubt dictated by the belief of the donor that the rental value of the property would increase, and that short terms of letting the property for rent would best conserve [119] one of the ends he designed to secure, namely, to provide an income for his wife and his children. The business judgment of the donor was no doubt correct at the time, but in this instance, as is so frequently true in other cases, it is demonstrated it is not within the power and judgment of man to infallibly anticipate future events and direct that which shall be the wiser course to be pursued in after years. The question being one which relates merely to the better or more judicious mode of managing and controlling the subject matter of the trust in order the design and wishes of the donor may be more completely accomplished, the stringent rule which properly obtains when the application is to devest the trustee of the title to the property which is the subject matter of the trust and vest such title in direct opposition to the will of the donor, ought not to be given full application."

The facts here are so similar to Marsh v. Reed, 184 Ill. 263, 56 N. E. 306, that a rediscussion of the principles hardly seems necessary. In the case at bar the trustees had the unqualified right to make a lease, and the only question is whether or not the term of the lease is unreasonable. The evidence discloses that the real estate in question is centrally located in the business district of Chicago, improved with a four-story, stone building, old and without modern conveniences, without elevator service, and without any means of heating except by stoves in each room. The only access to the upper floors is by means of wooden staircases, and the premises are surrounded with modern, improved buildings. It further appears that it is impossible to get first-class tenants. Part of the rooms are at present vacant on account of their inadequate condition to attract tenants. The rentals for some time past have been diminishing, and it is conceded that the situation will become worse. All parties interested, capable of consenting, consent to make the lease. The infants, of course, are incapable of consenting, and no doubt if they were capable they would, under the conditions here presented, also consent. They have no interest except a contingent [120] interest, and the improvement of the property surely cannot lessen the value of their contingent interest.

It is further insisted that persons not yet in esse may, on the happening of certain contingencies, become interested in this estate, and that no decree can bind such persons. This contention is without merit. In the case of Hale v. Hale, in discussing this question, we said (146 Ill. 259, 33 N. E. 868, 20 L. R. A. 247): "Such possible parties cannot, as a matter of course, be brought before the court in person, and it would be highly inconvenient and unjust that the rights of all parties in being should be required to await the possible birth of new claimants until the possibility of such birth has become extinct. If persons in being are before the court who have the same interest and are equally certain to bring forward the entire merits of the question and thus give such interests effective protection. the dictates both of convenience and justice require that there should be a complete decree. . . . . The rights of those in esse and those not in esse are protected by the decree in precisely the same way and to the same extent. . . . . The decree, therefore, must be held to be valid as a conclusive disposition of the rights of all the beneficiaries, as well those not in esse as those who were made defendants to the bill by name." So in this case,

parties not in esse are protected the same as those before the court. Nor can we see how their interests could be diminished by the making of the lease.

Under the facts disclosed in this record we think the decree of the court is not only just and reasonable, but it is manifestly for the benefit of all parties interested, both those in esse and those not in esse.

The judgment of the appellate court is therefore affirmed.

The Validity and Effect of Judgments **as against persons not in being is the subject of a monographic note to Rutledge v. Fishburne, 97 Am. St. Rep. 762.**

STAHL v. STAHL.

[214 Ill. 131, 73 N. E. 319.]

TRUST, CONSTRUCTIVE—Conveyance on Parol Understanding.—If an aged woman, while sick and not likely to recover, conveys land to one of her sons without consideration, there being a parol understanding that he shall hold it for the benefit of himself and her other children, equity will raise a trust by construction in favor of his brothers and sisters, and require him and his grantee with notice to execute it (pp. 104, 105.)

Bill to establish a trust in real property in favor of the children of Fredericka L. Stahl, deceased. She died intestate after conveying the property in question to her son, Frank H. Stahl, without consideration, who afterward conveyed the property to his brother, John Stahl, without consideration.

Morse Ives, for the appellants.

John F. Haas, for the appellees.

[134] HAND, J. The appellees averred in their answer that the deed bearing date August 18, 1900, executed by Fredericka L. Stahl to Frank A. Stahl, and the deed bearing date September 5, 1902, executed by Frank A. Stahl to John Stahl, were [135] absolute deeds of conveyance. It is apparent from the evidence that John Stahl took title to said premises with notice of the manner in which Frank A. Stahl obtained title thereto from Fredericka L. Stahl, and that said premises are impressed in his hands with the same trust, if any, which was impressed thereon when the title thereto vested in Frank A.

Stahl by virtue of the deed from his mother. The controlling question, therefore, in this case is, Did Frank A. Stahl, at the time he conveyed said premises to John Stahl, hold the title thereto in trust for the benefit of the children of Fredericka L. Stahl, and if he did, is such trust of that character that it can be enforced in a court of equity against Frank A. Stahl and John Stahl in favor of the children of Fredericka L. Stahl, deceased?

At the time Fredericka L. Stahl executed said deed to Frank A. Stahl she was seventy-two years of age and was sick in bed. The scrivener who prepared the deed was called by her grandson to her house at 11 o'clock at night. The deed was executed by her at about 12 o'clock of the same night. All her children, five in number, in the city of Chicago were assembled at her house. The premises conveyed were then of the value of about twenty-five thousand dollars—all the property she had. At that time Frank A. Stahl was a practicing physician in the city of Chicago and earning from three thousand dollars to four thousand dollars per year. The relations existing between Fredericka L. and all her children, including Frank A., were friendly and confidential. No consideration was paid to her by Frank A. Stahl for the conveyance, and the premises were subsequently conveyed to John Stahl by Frank A. Stahl without consideration. Frank A. Stahl, after the death of his mother, and John, after the conveyance to him by Frank A., both admitted that their brothers and sisters were equally interested with them in said premises. Such admissions were denied by them upon the trial. Louisa F., who was present on the night of the 18th of August, when the deed from Fredericka L. to Frank A. was executed, testified that her mother [136] was sick in bed; that her brothers and sisters in the city of Chicago were at her bedside, as it was thought she was about to die; that the children talked the matter over, and it was agreed it was advisable to have the mother make a deed to said premises so that they could be divided without expense after her death; that it was first talked of having the same conveyed to her sister; that it was finally agreed to have them conveyed to Frank A., and that each child was to have a paper from him showing the interest of each therein; that they sent for a lawyer, who came about midnight; that he prepared a deed; that they then aroused their mother and explained to her that she might not get well and they thought it best that she execute some papers; that she said to her children, "Is it your wish to have this paper made?"

and they said, "Yes," whereupon she was held up in the bed and signed the deed. The other children, four in number, the lawyer who prepared the deed and the grandson, who were present, admitted that Fredericka L. Stahl was sick; that she was in bed; that the lawyer was sent for in the middle of the night; that the deed was executed about midnight; that some of the children stayed up in the house all night; that no consideration was paid for the conveyance; that they knew no reason why the deed was made to Frank A. and that there was no reason for its execution at that time, but testified Fredericka L. was not very sick; that her mind was clear; that she said she wanted to convey all of her property absolutely to Frank A.; that nothing was said at that time about Frank A. holding the property in trust for the benefit of himself and her other children, and that the conveyance was an absolute conveyance to Frank A.

The chancellor saw and heard the witnesses testify, and evidently, from the decree entered by him, did not adopt the view of the witnesses for appellees who testified to what took place and what was said at the time of the execution of the deed, but did adopt the view of Louisa F., as he found in the decree that at the time the deed was executed and delivered [137] to Frank A., there was an express parol trust agreement that Frank A. was to hold the title to said property for the benefit of all the children of Fredericka L. We have read the evidence of all the persons who were present at the time of the execution of the deed to Frank A., who testified upon the trial, and are of the opinion the chancellor was fully justified in giving credence to the testimony of Louisa F. instead of the testimony of the other witnesses who testified as to what was said and what took place at the time the deed was executed. The question for decision, therefore, is narrowed to whether the facts as proven show the creation of such a trust at the time of the execution of the deed to Frank A., as a court of equity can enforce in favor of the children of Fredericka L., deceased.

The statute of frauds, requiring an express trust in regard to lands to be evidenced by writing, reads as follows: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect: Provided, that resulting trust or trusts created by construction, implication or operation of

law, need not be in writing, and the same may be proved by parol": Hurd's Statutes of 1903, c. 59, sec. 9, p. 996.

In Pope v. Dapray, 176 Ill. 478, 484, 52 N. E. 58, 59, it was said: "A constructive trust is one that arises where a person clothed with some fiduciary character, by fraud or otherwise gains something for himself: Perry on Trusts, sec. 27; Reed v. Reed, 135 Ill. 482, 25 N. E. 1095."

In Mayrand v. Mayrand, 194 Ill. 45, 48, 61 N. E. 1040, 1041, the following statement from Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808, defining the meaning of the term "fiduciary and confidential relation," as used in this connection, was quoted with approval. It was there said: "There is a well-defined distinction between undue influence arising from acts which the 188 law deems fraudulent, and undue influence resulting from fiduciary relations existing between the parties. . . . . 'The term "fiduciary or confidential relation," as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, Does such a relation in fact exist? . . . . Unless the party claiming the benefit of the contract shows, by clear and convincing proof, that he acted with perfect good faith and did not abuse or betray the confidence reposed in him, ... the presumption of fraud will require strong evidence to remove it.'"

Frank A. Stahl was a man of mature years, a practicing physician, and had the confidence of his mother and brothers and sisters to a marked degree. His mother was old and sick in bed. His brothers and sisters had been called to her bedside, and in the night-time a lawyer was sent for to prepare papers for her to sign relative to a disposition of her property. Her children, after consultation, agreed a deed should be made by her to said son conveying to him property worth twenty-five thousand dollars, which he agreed to hold for the benefit of himself and his brothers and sisters, the object thereof being to save the expense of probating his mother's estate and dividing her real property through the courts. It is apparent but for the confidence reposed in Frank A. by his mother and brothers and sisters the title to said premises would not have

been conveyed to him. After the title was thus obtained by him, to permit him to hold said premises free from the claims of his brothers and sisters is so opposed to equity and good conscience that a court of equity, in order to administer complete justice between the parties, will raise a trust, by construction, in favor of the brothers and sisters [139] and against Frank A. in said property, and require him, and his grantee with notice, to execute the same.

In Dowie v. Driscoll, 203 Ill. 480, 490, 68 N. E. 56, 60, it was said: "The doctrine repeatedly announced by this court is, that courts of equity 'will scrutinize with the most jealous vigilance' transactions between parties occupying fiduciary relations toward each other (Casey v. Casey, 14 Ill. 112), and that the burden of proof is on the beneficiary in such cases to establish the fairness of the transaction and that it did not proceed from undue influence." In this case Frank A. Stahl failed to explain in a satisfactory manner why his mother conveyed to him all her property without consideration, why his brothers and sisters stood by and assented to such transfer, and why he, without consideration, transferred said property to his brother John, if he was the absolute owner thereof at the time he transferred the same to him.

In Pope v. Dapray, 176 Ill. 484, 52 N. E. 59, it was said: "Where 'a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rule of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interests of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relations, and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it, or execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society': Perry on Trusts, sec. 166. This rule has been, by this court, quoted with approval in the cases of Beach v. Dyer, 93 Ill. 295, and Allen v. Jackson, 122 Ill. 567, 13 N. E. 840."

In Larmon v. Knight, 140 Ill. 232, 236, 33 Am. St. Rep. 229, 29 N. E. 1118, it was held, whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified [140] purpose—as, for example, a promise to con-

vey the land to a designated individual, to reconvey it to the grantor, or the like—and having thus fraudulently obtained the title, he retains, uses and claims the property as absolutely his own, the whole transaction by means of which the ownership is obtained will be treated, in equity, as a scheme of actual deceit, and in such state of case a court of equity will treat the person so acquiring the legal title as a trustee and decree him to hold the title for the benefit of the true beneficiary, and that parol evidence is admissible to establish such trust, as it arises ex maleficio, notwithstanding the plea of the statute of frauds.

And in Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666, where the wife obtained a deed from her husband by a promise to pay out of the property deeded one thousand dollars to each of his two grandchildren, and afterward refused to carry out the promise, the court said: "This is an attempt to perpetrate a fraud not only upon her husband, who was induced to make the gift to her by reason of her promise, but also upon the plaintiff, who, presumably, would have been otherwise provided for by her grandfather had it not been for the defendant's promise." It was also said: "Such a trust does not affect the deed, but acts upon the gift, as it reaches the possession of the grantee; and the foundation for the trust is, that equity will then interfere and raise a trust in favor of the persons intended to be benefited, in order to prevent a fraud."

Mr. Pomeroy, in his work on Equity Jurisprudence (volume 2, section 1054), says: "Whenever a person procures a devise or bequest to be made directly to himself—and thereby preventing, perhaps, an intended testamentary gift to another—through false and fraudulent representations, assurances or promises that he will carry out the original and true purpose of the testator, and will apply the devise or bequest to the benefit of a third person who is the real object and who would otherwise have been the actual recipient of the testator's [141] bounty, and after the testator's death he refuses to comply with his former assurances or promises but claims to hold the property in his own right and for his own exclusive benefit, in such case equity will enforce the obligation by impressing a trust upon the property in favor of the one who has been defrauded of the testator's intended gift, and by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect through a conveyance to the one who is beneficially interested." We think it can make no difference whether the title is obtained by will or by deed, and

see no difference, in principle, between the case stated by the author and the case at bar.

We are impressed, from a careful examination of this record, in view of the foregoing authorities, that the position assumed by Frank A. and John Stahl with reference to the property in question must be held to be constructively fraudulent, and by reason of that fact think this a case in which a court of equity may properly raise a constructive trust and fasten it upon the conscience of John Stahl, the present holder of the legal title, and convert him, as the holder of such title, into a trustee for the benefit of all the children of Fredericka L. Stahl, deceased, who in equity must be held to be the beneficial owners of said property: White v. Ross, 160 Ill. 56, 43 N. E. 336.

The cases relied upon by appellees we are of the opinion are not in point. Those cases, it will be found upon examination, are cases in which no fraud, actual or constructive, or fiduciary relation between the parties, was found to exist.

The decree of the superior court will be reversed and the cause remanded to that court, with directions to enter a decree in accordance with the views herein expressed.

Constructive Trusts in real property are excepted from the operation of the statute of frauds, and may be established by parol: Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189; Larmon v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229; Robinson Bank v. Miller, 153 Ill. 244, 46 Am. St. Rep. 883. Thus, a conveyance made because of the confidential relations of the parties, and without any other consideration than that the grantee shall hold the land in trust for the benefit of the grantor, or for the benefit of his daughter in case of his death, raises a constructive trust which may be established by parol evidence: Bowler v. Curler, 21 Nev. 158, 37 Am. St. Rep. 501. If a son induces his mother to convey property to him by promising that he will hold it for the benefit of, and will convey it to, another of her sons, but intending to claim the whole for himself, equity will declare him a mere trustee: Nordholt v. Nordholt, 87 Cal. 532, 22 Am. St. Rep. 268. See, too, Aherns v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620.

ILLINOIS CENTRAL RAILROAD COMPANY v. SEITZ.

[214 Ill. 350, 73 N. E. 585.]

TRIAL—Mixed Proposition of Law and Fact.—A proposition submitted to the court which requires it not only to adopt the party's view of the law, but also his contention as to disputed facts, is properly refused as presenting a mixed proposition of law and fact. (p. 110.)

CARRIER—Character of Freight—Notice to Employé.—The rule that where a bill of lading issued to a consignor upon his false representation as to the character of the goods, the carrier may hold them at their destination for additional charges because they belong to a class upon which higher freight rates may be exacted, does not apply if the carrier's employé who classified the goods saw them as they were being loaded on the car. (p. 110.)

CARRIER—Discrimination in Favor of Shipper—Additional Charges.—If a carrier makes an unlawful discrimination in favor of a shipper by contracting to carry goods at a lower rate than they should bear, it cannot, after the goods have reached their destination, charge against them an additional amount of freight sufficient to bring the total charge up to the proper rate. (pp. 110, 111.)

CARRIER—Estoppel.—In Trover Against a Carrier for goods sold to pay additional freight charges, the carrier is estopped to claim that the action cannot be maintained because the plaintiff is neither the consignor, the consignee, nor the assignee of the bill of lading, if the refusal to deliver the goods to him was placed solely on the ground the additional freight was not paid, the carrier's agent being advised that the goods belonged to the plaintiff. (p. 111.)

Trover by Seitz against the Illinois Central Railroad Company for the value of goods shipped from Chicago to Pana. A man named Kendall assisted Seitz in moving the goods from a store to the freight-yards, Seitz loading them on the dray at the store and Kendall loading them on the car at the freight-yards. Seitz gave Kendall the money to pay the freight, and Kendall directed his name to be placed on the bill of lading both as consignor and consignee. The clerk, in making out the receipt for the goods, described them as "emigrant movables"; and he testified that he did not know the character of the goods, but that Kendall told him they were an "emigrant outfit." Kendall testified that he knew nothing about the carrier's classifications of freight; but that the clerk saw the goods while they were being transferred from the dray to the car, and was in the car a number of times while it was being loaded. Another clerk rated the goods as of the seventh class, based on their description as emigrant movables in the bill of lading, and fixed the freight at twenty-eight dollars, which was paid.

Subsequently a freight inspector observed that the goods should have been designated as groceries, fixtures, horse, wagon, etc., and placed in the first class instead of the seventh. He thereupon changed the duplicate bill of lading accordingly, which increased the freight charges forty-five dollars and eighteen cents. When Seitz called for the goods at their destination, he refused to pay this additional charge, and the goods were sold to pay the same. The sale, however, was after the commencement of this action.

James M. Taylor and John G. Drennan, for the appellant.

John E. Hogan, for the appellee.

354 Per CURIAM. Appellant submitted to the circuit court fifteen propositions to be held as the law of the case. All were refused except the tenth. The only assignment of error open to consideration here is that which challenges the action of the court in refusing the propositions other than the tenth.

The first proposition submitted is in the following words: "Under the facts, as shown by the evidence in this case, the defendant had the right to reclassify the goods upon the inspection thereof and charge the proper freight, and demand the same upon the arrival of the goods at Pana, and to hold the goods so shipped until the proper freight charges were paid."

The facts in this case were disputed. In order to hold the proposition above set out, it was necessary not only that the court should adopt the appellant's view of the law, but also agree with its contention in reference to the facts. The proposition is therefore a mixed proposition of law and fact and was properly refused for that reason. Several other of the refused propositions were in like manner objectionable.

The third and fifth, however, which are subsfantially the same, are propositions of law. The fifth is in the language following: "If the evidence shows that the plaintiff, in the name of Kendall, secured a car from the defendant to ship goods from Chicago to Pana, and the plaintiff and Kendall loaded the car in person; and if the plaintiff or Kendall, caused the goods to be billed as 'emigrant movables' and shipped as seventh-class freight, but in fact loaded their car with merchandise which, under the rules and classifications and tariffs of the defendant, should have been billed and charged for as merchandise, then the plaintiff becomes liable for the extra freight so charged and the judgment should be for the defendant."

The law is that if the consignor falsely represents to the common carrier that the goods which he desires to ship are of a certain kind, and the carrier, without notice or knowledge [355] that they are of a different kind, accepts the goods and fixes and accepts the freight and delivers to the consignor a bill of lading on the basis that the goods are of the character stated by the consignor when in fact the goods are of an entirely different character, upon which the carrier would be lawfully entitled to charge a higher rate of freight, the carrier may, upon discovering this fact before the goods are delivered to the consignee at the place of destination, charge the excess of the freight against the goods and hold the shipment until the additional charges are paid: Smith v. Findley, 34 Kan. 316, 8 Pac. 871; Missouri etc. R. R. Co., v. Trinity County Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290.

The evidence tended to show that appellant's clerk, who first classified the goods as "emigrant movables," had seen the goods as they were being loaded. If he had, then the company had notice of the character of the shipment. The proposition last above set out does not include, and is not based upon, the hypothesis that at the time the goods were classified, the appellant had no notice of their real character, or that it relied upon the description of the goods given by Kendall. For this reason the proposition was, as we think, inaccurate.

Appellant contends, however, that even if it knew the character of the goods, it could not lawfully have allowed them to be shipped at a lower rate than the usual rate, so that it became its duty, even after collecting the freight and accepting the goods, to reclassify them and charge the additional freight against them, for the reason that not to do so would have been an unlawful discrimination in favor of the consignor, under sections 125 and 126 of chapter 114, Hurd's Revised Statutes of 1903.

Conceding, for the sake of the argument, that making a rate lower than the ordinary rate would be an unlawful discrimination as to the party favored within the purview of the statute referred to, we still think appellant's position untenable. If a common carrier makes an unlawful discrimination [356] in favor of a shipper by contracting to carry his goods at a lower rate than they should bear and accepts the goods and carries them at that rate, it cannot, after the goods have reached their destination, charge against them an additional amount of freight sufficient to bring the total charge up to the proper rate.

To do so would permit the carrier to make a rate lower than it properly should make, to secure the business, and thereafter take advantage of its own wrong to increase the charge and secure the usual compensation.

The only other question of law requiring consideration was submitted, in varying language, in several propositions, and is clearly stated in the eighth, which is as follows: "The plaintiff, Seitz, being neither the consignor nor the consignee, and the bill of lading not having been assigned to him by Kendall, cannot maintain this action."

It appears from the evidence of Kendall, the consignor, and Seitz, the appellee and owner of the goods, that they went together to the agent of appellant at Pana, presented the bill of lading, and sought to have the goods delivered to Seitz; that the agent was then advised by Kendall that the goods were the property of Seitz, and it further appears from their testimony that the only reason the goods were not so delivered at that time was because the additional freight charge was not paid. The agent did in fact permit Seitz to take the horse upon the latter agreeing to return it upon the agent's demand.

If appellant placed its refusal solely on the ground that the additional freight was not paid, it would not now be permitted to better its hold and contend that Seitz was not entitled to the goods because the bill of lading was not assigned. It would be estopped so to do: Ohio etc. Ry. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693. Did the testimony of Seitz and Kendall, to which we have just referred, not appear in the record, the proposition under consideration would be the law of the case. With that evidence before the court [357] the proposition ignored an element in the case, an alleged fact which the evidence tended to establish, and was therefore properly refused.

The judgment of the appellate court will be affirmed.

Where a Carrier enters into a special contract with a shipper to transport household goods at a greatly reduced rate, and the shipper, without the knowledge or consent of the carrier, puts into the car other goods which bear a higher freight, the carrier is entitled to additional compensation for the latter: Smith v. Findley, 34 Kan. 316, 8 Pac. 871. Where a shipper who acts as agent of the consignee fraudulently misclassifies freight, the carrier may recover a rate of freight according to a correct classification: Missouri etc. Ry. Co. v. Trinity County Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290. And it has been held that where a carrier, by mistake, names a lower freight rate than it should, it may exact the full schedule rate at the destination: Savannah etc. Ry. Co. v. Bundick, 94 Ga. 775, 21 S. E. 995; Rowland v. New York etc. R. R. Co., 61 Conn. 103, 29 Am. St. Rep. 175, 23 Atl. 755. Compare, Mobile etc. R. R. Co. v. Dismukes, 94 Ala. 131, 10 South. 289.

SCHWARTZ v. McQUAID.

[214 Ill. 357, 73 N. E. 582.]

LEASE—Property of Cotenancy.—A Lease Executed by One of four tenants in common, and approved by another, is presumed to have been made with the knowledge and consent of them all. (pp. 114, 115.)

LEASE—Illegal Use of Premises—Rights of Lessee.—If premises not leased for illegal purposes are nevertheless used for such purposes by the lessee, he is entitled to his day in court before being deprived of the benefits of his lease. (p. 115.)

LEASE—Prior Institution of Partition Proceedings.—Where a lease is made after the filing of a bill for partition of the premises, but the decree therein does not adjudicate the rights of the lessee and order him to surrender possession, he cannot be forcibly evicted by one deriving title through the partition sale. (p. 115.)

LEASE—Possession.—If a Lessee Surrenders His Key to the lessors to enable them to care for the contents of the building while he is detained in jail, he does not thereby part with posession so as to bar himself of the right to maintain trespass for a forcible entry of the premises. (p. 116.)

TRESPASS—Entry of Building, When Forcible.—Entering a building in the possession of another by removing, with at least some force, obstructions placed over an opening in the window, is a trespass. (p. 116.)

JUROR—Misconduct—Controversy with Counsel.—A remark by a juror as to the law applicable to the facts of the case, made during a controversy between him and counsel in the course of the latter's argument, does not justify the setting aside of the verdict, where the attorney himself was not without fault, and the judge promptly sustained an objection to the misconduct, and as far as he could removed any prejudicial effect arising therefrom. (p. 116.)

TRESPASS.—Evidence that a Building was in a Dilapidated Condition is not admissible in an action for trespass in entering it. (p. 116.)

Haight & Reuss and Bottsford, Wayne & Bottsford, for the plaintiffs in error.

J. F. Snyder and L. E. De Wolf, for the defendant in error.

358 WILKIN, J. On September 24, 1903, the defendant in error began an action of trespass against the plaintiffs in error in the circuit court of DuPage county. The amended declaration alleged that the plaintiffs in error, wrongfully intending to injure the defendant in error, on or about May 1, 1902, with force and arms broke and entered a dwelling-house and store building of the defendant in error in DuPage county and stayed there for a long space of time, and broke and damaged

four doors belonging to said building, and spoiled certain fastenings thereof of the value of ten dollars, and seized and took divers chattels of defendant in error, and prevented defendant in error, during all that time, from transacting his necessary business; that they also broke and entered another dwelling-house and store of defendant in error in said county and expelled him and his family therefrom, and kept them so expelled and deprived them of the use of said building. The plaintiffs in error filed pleas of not guilty and liberum tenementum, alleging in the latter plea that said property mentioned in the amended declaration now is, and at the time of the breaking and entering was, the close, soil and freehold of the plaintiff in error, Ferdinand Schwartz, and that he ought not to be barred of his action, because the close was, at the time mentioned in said declaration, in the possession of said plaintiff in error, Ferdinand Schwartz. Upon a hearing before the court and a jury a verdict was rendered in favor [359] of the defendant in error for two hundred and ten dollars. Judgment was entered upon the verdict, and from that judgment this writ of error is prosecuted.

The facts are substantially as follows: The premises in question consist of a store building situated in Lisle, DuPage county, and were owned by Joseph M. Mueller, Frank H. Haumesser, Emil Schmitt and Eugene Heim, as tenants in common. On December 24, 1901, a bill was filed in the circuit court of DuPage county for the partition of the property and certain lands surrounding it. On May 1, 1902, Haumesser, one of said tenants in common, executed and delivered to the defendant in error, Michael McQuaid, a written lease for the store building for a period of three years from July 1, 1902, which lease was attested by Schmitt. For about a month prior to the execution of this lease McQuaid had been in possession of the building, engaged in the business of selling beer, and had also lived there with his family. On November 28, 1902, a decree of partition was rendered by the court setting out the interests of the parties and appointing commissioners to make partition. A subsequent decree found that since the filing of the bill Haumesser had transferred all of his interest to W. A. Tope, whose appearance had been entered, and it further recited that the commissioners reported the premises indivisible, and it ordered a sale by the master. On March 13, 1902, the defendant in error, McQuaid, was arrested, under an indictment found by the grand jury of DuPage county, for selling liquor upon the premises

without a license. He was subsequently convicted and sentenced to the county jail for ninety days, which term he served. At the time he was taken to jail no one was left in possession of the premises, his wife and children living elsewhere. He locked up the room, leaving therein his effects, consisting of some beer in cases, three stoves, a trunk containing clothing, chairs, tables, cooking utensils, etc. On March 16, 1903, the premises were sold by the master, under the decree, to A. H. Dickes, and on April 8, 1903, a deed of [360] conveyance was issued to him. On April 13, 1903, Dickes conveyed the premises to the plaintiff in error Ferdinand Schwartz. On April 14th Joseph Schwartz, who was a son of Ferdinand Schwartz, went to the building, pushed aside an obstruction fastened over a hole in one of the windows next to the door, removed some beer cases which had been piled against the window, opened the door and entered the room. He placed new locks on the doors, boarded up the windows and took possession of the building. While McQuaid was still in jail plaintiffs in error notified him to remove his effects from the building, which he failed to do, and subsequently the agent of the Pabst Brewing Company removed about twenty-two beer cases which it claimed to own, together with a clock and a bushel of potatoes. McQuaid was released from jail on June 16, 1903, and immediately made demand upon the plaintiffs in error for possession of the premises under his lease, which possession was refused, but plaintiffs in error claim they notified him he could have all of his property in the building. He then began this suit.

It is first claimed by plaintiffs in error that at the time of the execution of the lease by Haumesser to McQuaid, Haumesser was the owner of only a part of the premises, and that by executing a lease for all of the premises, and because the premises were leased by McQuaid for the illegal purpose of selling liquor without a license, the whole transaction was thus tainted with such fraud and illegality as to reduce McQuaid from the status of an innocent and lawful lessee or tenant to that of a mere tortious occupant, and he was therefore not entitled to retain the premises as against the rightful owner. We do not think this contention can be maintained. [361] At the time the lease was executed Haumesser was the owner of only a portion of the premises, but his act of leasing was approved by Schmitt, who was one of the other owners, and there is nothing in the record to show that Haumesser did not act as the agent of the tenants in common or that the other tenants in common made

any objection to the leasing. McQuaid entered and remained in possession for several months after the execution of the lease, paying the rent. In the absence of evidence to the contrary we will presume that the lease was made with the knowledge and consent of all of the tenants in common. There is nothing to show that the premises were leased for an illegal purpose. While it is true that McQuaid used them for an illegal purpose, and that fact might authorize the lessor to avoid the lease, yet the lessee would be entitled to his day in court before he could be deprived of the benefits of his lease.

It is next insisted that as the lease was made after the filing of the bill for partition, McQuaid took the interest in the premises which he derived through the lease pending the partition suit, and the decree of partition and order of sale were therefore binding upon him. While it is true the lease was made subsequent to the filing of the bill for partition and the interest of McQuaid in the premises was taken subject to the rights of the parties to that suit, the decree of partition did not take into consideration his interest. That interest might have been adjudicated and the decree ordered him to surrender possession to the purchaser or his grantee, but in the absence of any such order he could not be forcibly evicted. Even though he was wrongfully in possession the defendants below had no right to oust him unless they could do so without force.

It is next contended that during the time McQuaid was in jail, and during the trial, Haumesser had the key to the building, and was in possession at the time of the entry by plaintiffs in error, and hence McQuaid cannot maintain this action; also, that even if McQuaid was in possession, the [362] entry of plaintiffs in error was peaceable and without force, and as they were entitled to possession defendant in error could not maintain this action. The evidence shows that at the time McQuaid was taken to jail he left his effects in the building with no one in charge. The building was not in good repair, and one of the windows near the door was broken. That opening was covered with a piece of tin, pasteboard or some other temporary covering. Haumesser went to the jail and got the key from McQuaid and in company with another man entered the building for the purpose of seeing that the contents were intact. He claims that they nailed a board in a substantial manner over the opening in the window, and piled the beer cases against it so as to prevent anyone from entering in that way. By the surrender of the key to Haumesser, McQuaid did not part with

his possession of the building, but the delivery was made simply for the purpose of taking temporary care of the contents, pending the expiration of McQuaid's sentence. The evidence shows that at the time plaintiffs in error entered the building it was necessary for them to remove the obstructions placed over the opening in the window. Just how much force was used does not clearly appear, but it was shown that the entry was at least with some force, and McQuaid still having the possession, the plaintiffs in error were guilty of the trespass for which the suit was brought.

After the evidence had been submitted, and during the argument of counsel to the jury, a controversy arose between one of the attorneys for plaintiffs in error and a juror, in which the juror expressed an opinion as to the law applicable to the facts of the case. Objection was made to this conduct of the juror. The objection was sustained by the court and the juror informed that it was not proper for him to make such remark at that time. It is now insisted by plaintiffs in error that because of such misconduct of the juror the jury should have been discharged, or instructed to bring in a verdict for the plaintiffs in error. In the controversy between [363] counsel and the juror the attorney himself was not wholly without fault. The remark of the juror was improper, but the judge promptly sustained the objection thereto, and as far as he could removed any prejudicial effect which would result therefrom. We do not think the irregularity was of so grave a character as to justify the setting aside of the verdict and ordering another jury to try the issues.

Complaint is made of certain remarks by counsel for defendant in error in his argument to the jury. They were objected to at the time, and the court sustained the objection and instructed the jury to disregard them. No reversible error is shown in this respect.

The plaintiffs in error offered evidence tending to show that the building was in a dilapidated condition, which was objected to by defendant in error and the objection sustained, which ruling is assigned for error. We are unable to see how the evidence in any way tended to enlighten the issues being tried. The question was whether or not plaintiffs in error had been guilty of trespass by forcibly entering while the building was in the possession of the defendant in error. The court therefore committed no error in excluding the evidence.

Complaint is next made of the refusal of the third and ninth

instructions offered on behalf of the plaintiffs in error. We have examined the instructions given, and are of the opinion that the jury were fully instructed as to the law applicable to the facts, and that the refusal of the two was not error.

From a consideration of the whole case we are of the opinion that the evidence sufficiently showed that the defendant in error was rightfully in possession of the premises at the time of the entry by the plaintiffs in error, and that the entry by them was with such force as to make them guilty, in law, of trespass.

The judgment of the circuit court is therefore affirmed.

The Surrender of Leased Premises by delivering the key to the lessor is considered in Blake v. Dick, 15 Mont. 236, 48 Am. St. Rep. 671; Bowen v. Clark, 22 Or. 566, 29 Am. St. Rep. 625.

Entering a Building as an actionable trespass is considered in Adams v. Freeman, 12 Johns. 408, 7 Am. Dec. 327; Breitenbach v. Trowbridge, 64 Mich. 393, 8 Am. St. Rep. 829; North v. Williams, 120 Pa. St. 109, 6 Am. St. Rep. 695; State v. Hawkins, 125 N. C. 690, 74 Am. St. Rep. 669; Seals v. Williams, 80 Miss. 234, 92 Am. St. Rep. 601.

POWELL v. PEOPLE.

[214 Ill. 475, 73 N. E. 795.]

MANDAMUS—Parties—Officer Sought to be Removed.—In mandamus proceedings to compel civil service commissioners to cancel their certificate of the eligibility of an officer, and certify the petitioner for appointment to the office, the officer whose removal is sought is a necessary party. (p. 119.)

MANDAMUS—Parties—Person Collaterally Affected.—When a person, who is within the jurisdiction of the court, is shown by a petition in mandamus to have a legal interest in the right or duty sought to be enforced, which interest will be collaterally determined if judgment is rendered as prayed, the cause should not be adjudicated until he is made a respondent. (p. 120.)

MANDAMUS—Omission of Party—Reversal on Appeal.—The omission of a necessary party in a petition for mandamus, the omission appearing upon the face of the record, requires the supreme court, of its own motion, to decline to consider the cause, and to reverse a judgment awarding the writ. (p. 121.)

Maclay Hoyne and Edgar Bronson Tolman, for the plaintiffs in error.

Farlin H. Ball, for the defendant in error.

476 BOGGS, J. This was a petition for mandamus, filed in the superior court of Cook county by the defendant in error,

the people of the state of Illinois, on the relation of Perry L. Hedrick, against the plaintiffs in error, the civil service commissioners of the city of Chicago.

The petition alleged that on January 12 and 13, 1904, examiners appointed by the civil service commissioners to conduct an examination for eligibles for appointment to the office of chief sanitary inspector of the city of Chicago, completed such examination and certified as "passed and qualified" for said position the names of Charles B. Ball, Perry L. Hedrick (the relator), George A. Johnson and Thomas S. Ainge, and that the plaintiff in error commissioners placed the names of said persons so found to be qualified for the position upon the list of eligibles, and posted and published said list as a proper list of eligibles to the alleged office of chief sanitary inspector. It was further alleged that said Ball, Johnson and Ainge were each nonresidents of the state of Illinois; that Ball and Johnson were residents and citizens of the state of New York and that Ainge was a resident and citizen of the state of Michigan. It was further alleged in the petition that section 6 of article 7 of the constitution of 1870 prohibits the appointment of any person not a resident of the state of Illinois to the said office of chief sanitary inspector, and that by an enactment of the General Assembly adopted June 21, 1895, entitled "An act to amend an act entitled 'An act to provide for the incorporation of cities and villages'" (1 Starr & Curtis' Statutes of 1896, p. 723), it was provided that persons who had not resided in the city or village for at least one year should not be eligible to any office in such city or village, and that by reason of the said constitutional provision and said statutory enactment the said Ball, Johnson and Ainge were ineligible to appointment to said [477] position; that the relator was a citizen of the United States and of the state of Illinois, and had resided in the said state of Illinois for more than one year next preceding, and was a qualified elector of the said city of Chicago and was in no wise disqualified to be appointed to said office; that it became the duty of the said civil service commissioners to certify the name of the relator for appointment as chief sanitary inspector of said city; that he served upon the said plaintiff in error commissioners a written demand to so certify him for said appointment; that the said demand was refused and that the name of said Charles B. Ball was certified by the said commissioners, and the said Ball was appointed to the said alleged office of chief sanitary inspector, and has been inducted

into said office and was discharging the duties thereof. The petition prayed for a writ of mandamus commanding the said civil service commissioners "to strike from said list of eligibles the said Charles B. Ball, George A. Johnson and Thomas S. Ainge, to cancel and withdraw their certification to the commissioner of health of said Ball, and to certify to said commissioner of health of the city of Chicago, for appointment as chief sanitary inspector, Perry L. Hedrick, the relator." The plaintiffs in error filed their answer to the petition, but the court sustained a demurrer thereto, to which action of the court the commissioners excepted and elected to abide their answer. Judgment was entered ordering that a peremptory writ of mandamus issue commanding respondents to strike from the civil service list of eligibles for chief sanitary inspector, Charles B. Ball, George A. Johnson and Thomas S. Ainge, and to cancel and withdraw their certification to Arthur R. Reynolds, commissioner of health of the city of Chicago, of Charles B. Ball for said office of chief sanitary inspector, and forthwith certify to said commissioner of health for appointment as chief sanitary inspector, the petitioner. This is a writ of error to bring the judgment of the superior court into review in this court.

478 The purpose to be attained by the petition is to declare the said Ball, Johnson and Ainge to be ineligible to hold or exercise the duties of chief sanitary inspector, and the effect of the judgment entered by the trial court, if it has force and effect according to the findings and command thereof, is to cancel the certification of said Ball for appointment to the position and to deprive him of further right or authority to hold and exercise the duties of the place or receive the salary or emoluments thereof. It appeared from the face of the petition, and also from the findings of the judgment, that said Ball was exercising the duties of the position in the city of Chicago and was within the jurisdiction of the superior court, before whom the proceeding was pending, and that he was therefore a necessary respondent to the petition. In 13 Encyclopedia of Pleading and Practice, concerning the persons necessary to be made respondents to a petition for mandamus, it is said (page 656): "All persons whose rights will be affected by the proceeding are necessary respondents." In Wright v. Kelly, 4 Idaho, 624, 43 Pac. 565, it was ruled that "courts will not, upon summary proceedings in mandamus, determine the constitutionality of statutes fixing the rights of third per-

sons not parties to the suit." In Dement v. Rokker, 126 Ill. 174, 19 N. E. 33, which was a proceeding in mandamus against certain of the officers of the state composing the commissioners of contracts, and others, to compel the payment of money claimed to be due the petitioners under a printing contract of the state, a person who was interested in the contract was not made a party petitioner, and we said (126 Ill. 190, 19 N. E. 39): "Under our statute a mandamus proceeding is an action at law, and it is therefore governed by the same rules of pleading that are applicable to other actions at law: Rev. Stats. 1874, c. 87, sec. 1; 2 Starr & Curtis' Statutes, p. 1584; People v. Glann, 70 Ill. 232. Hence, when the petition is to enforce a private right, the petitioner must be the party in interest: Pike County v. People, 11 Ill. 202. Necessarily, therefore, the writ will not be granted when parties are shown to have [479] a legal interest in the contract sought to be enforced who are not before the court, and whose rights will be collaterally determined by the judgment if rendered as prayed."

In a proceeding for mandamus, when a party is shown by the petition to have a legal interest in the right or duty sought to be enforced by the writ and that the rights of such party will be collaterally determined by the judgment if rendered as prayed in the petition, the cause should not be adjudicated until such party shall be made respondent thereto, when, as in the case at bar, he is shown to be within the jurisdiction of the court. That the said Ball is a proper and necessary party to the proceeding appears affirmatively on the face of the petition and of the answer and of the judgment entered in the superior court. When such want of proper parties in the trial court appears upon the face of the record brought into this court, the defect, unless in some way waived, will necessitate a reversal of the judgment in this court. The petitioner, in his petition, disclosed that a necessary respondent had been omitted. A plea was not, therefore, necessary to bring the fact before the trial court: Cummings v. People, 50 Ill. 132; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003. In the former case we said: "This defect in the declaration [the omission of a necessary party] could have been reached by general demurrer or by motion in arrest of judgment, and can now be availed of on error."

The omission of Ball as a necessary respondent could not be waived by any of the parties to the proceeding. They may be willing to submit the matter for decision without him as a party, but that would not invest the trial court with jurisdic-

tion over him or with power to adjudicate as to his rights. Ball is not interested in this proceeding merely as one who has interests or rights the enforcement or preservation whereof may be controlled by a rule or principle of law to be announced in the case, but the purpose of this proceeding and the prayer of the petition, and likewise the command of the judgment entered in the superior court, are, [480] that the name of Ball shall be stricken from the list of eligibles for chief sanitary inspector, and that the civil service commissioners shall cancel their certificate to the commissioners of health for the appointment of the said Ball and shall certify the petitioner for appointment to the office now held by said Ball.

The error into which the superior court fell in adjudicating as to the rights and interests of Ball without having jurisdiction of his person need not be called to the attention of this court or urged by either of the parties to the record. The pleadings disclosed that he was interested and that it was sought to adjudicate upon his rights, and the record disclosed that the superior court was wanting in jurisdiction of his person, and consequently lacking in power to legally adjudicate and determine whether his certificate of eligibility was legal and binding or whether it should be canceled as invalid and its place taken by a certificate to be issued for the relator. The want of jurisdiction and power in the superior court appeared upon the face of the record and remains inherent in the judgment rendered in that court, and cannot be removed or obviated by any judgment entered in this court on that record, hence it is the duty of this court, on its own motion, to decline to proceed to the consideration of the cause in the absence of the party who is directly and materially interested in the litigation. The judgment of the superior court should be reversed and the cause remanded, to the end that jurisdiction may be acquired over all persons who have the right to be heard before judgment is pronounced.

Whether any such office as chief sanitary inspector legally exists seems fairly debatable so far as this record touches the question, but that is also important and material to the rights of Ball, and is therefore not considered because he is not a party to this proceeding.

For the reasons indicated the judgment will be reversed and the cause remanded.

NECESSARY PARTIES TO PROCEEDINGS IN MANDAMUS.

I. Petitioners or Relators.
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I. Petitioners or Relators.

a. **Party in Interest.**—Mandamus has almost, if not quite, lost its character as a prerogative writ, and come to be regarded rather as a writ of right, demandable in a civil action whenever it is an appropriate remedy. While some authorities do not consider it as strictly a "civil action" under the reformed procedure (State v. Carey, 2 N. Dak. 36, 49 N. W. 164), still the tendency in modern practice is to regard it as nothing more than an action at law between the parties: Windsor v. Polk County, 115 Iowa, 738, 87 N. W. 704; First Nat. Bank v. Lancaster, 54 Neb. 467, 74 N. W. 858; State v. Whiteside, 30 S. C. 581, 9 S. E. 661, 3 L. R. A. 777; Kentucky v. Dennison, 65 U. S. (24 How.) 66, 97, 16 L. ed. 717. Being regarded as an action at law, it follows that mandamus is governed by practically the same rules of pleading that govern other actions at law. Therefore, if the petition is to enforce a private right, the petitioner must be the party in interest: County Commissioners v. People, 11 Ill. 202; Dement v. Rokker, 126 Ill. 174, 190, 19 N. E. 33.

b. **Name of the State or People.**—A remnant of the ancient distinction enjoyed by the writ of mandamus is still found in the style or name of the proceedings. In some jurisdictions it is still the common and better approved practice to bring the action in the name of the sovereign power, on relation or complaint of the party beneficially interested: Higgins v. Galesburg, 96 Ill. App. 471; State v. Curler (Nev.), 67 Pac. 1075; Rider v. Brown, 1 Okla. 244, 32 Pac. 341; Whitesides v. Stuart, 91 Tenn. 710, 20 S. W. 245; State v. County Court, 47 W. Va. 672, 35 S. E. 959. Of course, if the duty sought to be enforced is due the state as such, then the proceedings should be in the name of the state: State v. Carey, 2 N. Dak. 36, 49 N. W. 164. But the courts are now pretty generally agreed that private persons may move for a mandamus to enforce even a public duty, not due to the government as such, without the intervention of the government law officer: Chicago etc. R. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824; Hall v. Mann, 96 Ill. App. 659; Windsor v. Polk County, 115 Iowa, 738, 87 N. W. 704; Pumphrey v. Mayor etc. of Baltimore, 47 Md. 145, 28 Am. Rep. 446; Attorney

General v. Boston, 123 Mass. 460, 479; Elliott v. Detroit, 121 Mich. 426, 84 N. W. 820; State v. Weld, 39 Minn. 426, 40 N. W. 561; State v. Nash, 66 Ohio St. 612, 64 N. E. 558; Milster v. Spartanburg, 68 S. C. 26, 46 S. E. 539; Union Pac. R. R. Co. v. Hall, 91 U. S. 343, 355, 23 L. ed. 428. For example, a passenger may institute mandamus in his own name, without the intervention of some officer to represent the commonwealth, to compel a street railway company to transfer him from one of its lines to another: Richmond Ry. etc. Co. v. Brown, 97 Va. 26, 32 S. E. 775. And where one opens a coal mine on the line of a railroad, which, after furnishing him cars for a time, refuses to continue to do so unless he will sell his coal at a rate much less than the market price to a corporation controlled by the president of the railroad company, he may, without the intervention of the attorney general, institute mandamus proceedings to compel the railroad company to furnish him cars: Loraine v. Pittsburg etc. R. R. Co., 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502.

When mandamus is invoked for the enforcement of a purely private right, it would seem clear, at least under the reformed procedure, that the proceedings may be conducted in the name of the actual parties in interest, and that the state is not a necessary party: State v. White, 116 Ala. 202, 23 South. 31; Stoddard v. Benton, 6 Colo. 508; Lord v. Bates, 48 S. C. 95, 26 S. E. 213. Indeed, in such cases, it would seem that the proceedings should not be entitled in the name of the state on the relation of the real party in interest, but he should be named as the plaintiff: Smith v. Lawrence, 2 S. Dak. 185, 49 N. W. 7; Howard v. Huron, 5 S. Dak. 539, 59 N. W. 833, 26 L. R. A. 493; Heintz v. Moulton, 7 S. Dak. 272, 64 N. W. 135. Not only should such an action be brought in the name of the real party in interest, without the use of the name of the people, but perhaps it must be so brought: People v. Pacheco, 29 Cal. 210; State v. Board of County Commissioners, 11 Kan. 66; State v. Wright, 67 Kan. 847, 73 Pac. 50. Some authorities hold, however, that notwithstanding the application is made in the interest of a private citizen, it is proper to bring the proceedings in the name of the state on the relation of the party beneficially interested: State v. Spicer, 36 Neb. 469, 54 N. W. 849; State v. Carey, 2 N. Dak. 36, 49 N. W. 164; State v. Pacific Brewing etc. Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

II. Parties Defendant or Respondent.

a. Persons Whose Interests are Involved in General.—Generally speaking, all persons interested in the matter involved must be made parties to an application for a writ of mandamus. The writ will not be granted if persons are not before the court who have an interest in the right sought to be enforced which will be collaterally determined by the judgment if rendered as prayed. This is the doctrine

of the principal case, ante, p. 117. To the same effect, see Farmers' High Line Canal Co. v. People, 8 Colo. App. 246, 45 Pac. 543; State v. Trustees of Impr. Fund, 20 Fla. 402; Dement v. Rokker, 126 Ill. 174, 19 N. E. 33; Cullen v. Latimer, 4 Tex. 329; Commissioners of Land Office v. Smith, 5 Tex. 471. On the other hand, however, it is not the practice to make any other person respondent than the officer failing or refusing to perform a plain duty. Thus, where it is sought to compel a justice of the peace to issue an execution, the court may, in its discretion, refuse, at the instance of the respondent, to make the judgment debtor a party to the proceeding: Adams v. Casey-Swasey Co., 15 Tex. Civ. App. 379, 39 S. W. 654, citing State v. Burkhardt, 59 Mo. 75. Where a statute requires the license of a foreign insurance company to be revoked upon a violation of its conditions, without notice to the company, a mandamus to compel such revocation will be granted without requiring the company to be made a party to the action: State v. Doyle, 40 Wis. 220.

b. **Persons Having an Interest in Real Property.**—When mandamus is invoked in a case relating to real property, all persons having an interest in the property must be made parties to the proceeding: Austin v. Register of Deeds, 41 Mich. 723, 49 N. W. 923; Campan v. Board of Public Works, 80 Mich. 372, 49 N. W. 39; Crockett v. Shaw, 29 Tex. 508; Texas Mexican Ry. Co. v. Jarvis, 80 Tex. 456, 15 S. W. 1089. Thus, mandamus will not be awarded to compel the commissioner of the general land office to issue a patent, when it appears that there are adverse claimants to the land who are not made parties to the action: Chappell v. Rogan, 94 Tex. 492, 62 S. W. 539. Mandamus will not lie to compel the superintendent of buildings to act, where his action will involve the destruction of buildings to a greater or less extent, and the owners have not been made parties to the proceedings: People v. Stewart, 77 N. Y. Supp. 1054, 77 App. Div. 181. And persons in possession of a street, claiming under a contract with the city which probably is invalid, are necessary parties to a mandamus by abutting property owners to compel the city authorities to open the street and remove obstructions therefrom: Gibbs v. Ashford, 27 Tex. Civ. App. 629, 66 S. W. 858. See, too, People v. Mayor etc. of Bloomington, 38 Ill. App. 125.

c. **Lessors and Lessees.**—In mandamus proceedings to compel the board of land commissioners to cancel a lease of school lands, the lessee is a necessary party: State v. Board of Land Commissioners, 7 Wyo. 478, 53 Pac. 292. Clearly, in such a case, a person could not legally have his muniment of title canceled without an opportunity to be heard. But where a lessee, in full possession and control of a railroad, has constructed a bridge and crossing encroaching upon a highway, the owner and lessor does not seem to be a necessary

party in mandamus proceedings to compel the restoration of the highway to its former state: People v. Northern Cent. Ry. Co., 164 N. Y. 289, 58 N. E. 138.

d. Adverse Claimants to Office.

1. **Where Right to Office Involved.**—Perhaps one claiming the right to a public office may institute mandamus against the proper authorities to compel a recognition of his rights, without making an adverse claimant a party to the proceedings: See People v. Board of Supervisors, 59 N. Y. Supp. 476, 42 App. Div. 510, affirmed in 161 N. Y. 619, 55 N. E. 1099; Matter of Jones v. Willcox, 80 N. Y. Supp. 420, 8 App. Div. 167. But if the proceedings involve and determine the rights of the adverse claimant to the office, and contemplate his removal, he is entitled to his day in court and should be made a party defendant: See the principal case, ante, p. 117; Matter of Hart, 159 N. Y. 278, 54 N. E. 44; People v. Scannell, 71 N. Y. Supp. 383, 63 App. Div. 243; People v. Dobbs' Ferry, 71 N. Y. Supp. 578, 63 App. Div. 276; Cross v. West Virginia etc. Ry. Co., 34 W. Va. 742, 12 S. E. 765. It has been decided, however, that where mandamus is prayed to compel the clerk of the common council of a city to amend its record so that it should show the appointment of the plaintiff by the council as policeman in the place of A, neither the city nor A is a necessary party to the petition: Farrell v. King, 41 Conn. 448. This case is approved in Denver v. People, 17 Colo. App. 190, 68 Pac. 114.

In mandamus to require a recount of the ballots under the New York election law, the poll clerks are necessary parties: Matter of Stiles, 75 N. Y. Supp. 278, 69 App. Div. 589.

2. **Where Right to Salary Involved.**—One who is entitled to the office of district attorney, but who is not in possession, is not bound by a judgment in mandamus proceedings against the board of supervisors to which he was not a party, requiring the board to audit and allow the salary of another in possession of the office without title: People v. Smyth, 28 Cal. 21. But in mandamus proceedings to compel the auditor to issue a warrant for the petitioner's salary as superintendent of schools, the alleged de facto superintendent to whom the salary has been paid, but who is now out of office, is not a necessary party: Williams v. Clayton, 6 Utah, 86, 21 Pac. 398.

e. **Body or Board of Officials.**—In mandamus proceedings to compel a body of persons or officials to perform an act, they are all necessary parties: Gaal v. Townsend, 77 Tex. 464, 14 S. W. 365; State v. Superior Court, 4 Wash. 327, 30 Pac. 82. Perhaps even a member of the body or board who is willing to act must be made a party defendant with the unwilling ones: Lyon v. Rice, 41 Conn. 245. The law is thought to be otherwise, however, in Heintz v. Moulton, 7 S. Dak. 272, 64 N. W. 135.

On the other hand, mandamus runs only against the officer who is to do the particular official act commanded: State v. Brown, 19 Wash. 383, 53 Pac. 548. Thus, it seems that it is no objection to proceedings to compel a performance of duty by a prosecuting officer, that his associates on the police force whose co-operation with him may be necessary to a compliance with the prayer in the petition, are not made parties to the proceeding: Goodell v. Woodbury, 71 N. H. 378, 52 Atl. 855.

f. **Other and Miscellaneous Persons.**—Where the statute requires the highway commissioner to submit to the township board the proposed expenditure for the construction of a bridge and obtain the approval of that body, and he has done so and the board has refused its approval, it is a necessary party in mandamus to compel the erection of the bridge: Berube v. Wheeler, 128 Mich. 32, 87 N. W. 50.

Where mandamus is resorted to to compel the passage of a city ordinance in performance of a duty imposed by law, it is necessary to make only the city a party defendant; but when the writ issues it should be against the individual members of the city council: Charleston v. Moore, 94 Ill. App. 51.

The city of St. Louis is not a necessary party in mandamus to compel the city auditor to draw his warrant for the salary-roll of the police force: State v. Mason, 153 Mo. 23, 54 S. W. 524.

In mandamus proceedings in California to compel the county board of education to issue a teacher's certificate, the county superintendent of schools, in his official capacity, is not a necessary party defendant; it is sufficient to join him in his capacity as a member of the board: Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871.

It is not necessary to make the officers of a corporation parties to a mandamus to compel the corporation to cause its officers to make and file a certificate, required by the Delaware statutes, containing statements as to the amounts of calls or installments of the capital stock paid, and also the amount of the capital stock previously paid and reported: Bay State Gas Co. v. State, 4 Penne. (Del.) 497, 56 Atl. 1120.

The execution creditor and debtor are not necessary parties in mandamus proceedings to compel a sheriff who has sold property under execution to receive the amount bid by the petitioner, and convey the property to him: State v. Scarborough, 56 S. C. 48, 33 S. E. 779. And it is not an abuse of discretion, where it is sought to compel a justice of the peace to issue an execution, to refuse, at the instance of the respondent, to make the judgment debtor a party to the proceedings: Adams v. Casey-Swasey Co., 15 Tex. Civ. App. 379, 39 S. W. 654.

In summary proceedings in mandamus, courts will not determine the constitutionality of statutes fixing the rights of third persons not parties to the action: Wright v. Kelly, 4 Idaho, 624, 43 Pac. 565; Supervisors of Nottoway County v. Powell, 95 Va. 635, 29 S. E.

682. In Brooks v. State, 162 Ind. 568, 70 N. E. 980, it is held that the only necessary parties to a proceeding to test the constitutionality of a statute apportioning the number of senators and representatives in the state according to the last preceding enumeration of the male inhabitants for legislative purposes, are the clerk, sheriff and auditor of the county.

CLARK v. PATTERSON.

[214 Ill. 533, 73 N. E. 906.]

EXECUTOR Named in Will must be Appointed by Court.—The word "shall," in a statute declaring that the probate court shall issue letters testamentary to the executor named in a will if he is legally competent, is used in an imperative sense. (p. 130.)

EXECUTOR—Competency—Moral Delinquencies.—If the woman named by a testator as executrix of his will is legally competent, the court cannot refuse to grant her letters testamentary on the ground that she had held illicit sexual relations with the testator. (p. 130.)

EXECUTOR—Competency—Adverse Interest.—If the woman named by a testator in his will as executrix is legally competent, the court cannot refuse to grant her letters testamentary on the ground that she had sustained intimate relations with testator and had received property from him during the continuance of such relations. (p. 133.)

EXECUTOR—Competency—Adverse Interest and Want of Harmony.—If the statutes, in enumerating the causes rendering an executor disqualified, do not mention an adverse interest of a creditor of the testator or a want of harmony with the heirs and coexecutors as disqualifications, the court will not refuse letters testamentary for those causes. (p. 133.)

EXECUTOR—Revocation of Letters.—It is only when one or more of the statutory causes for revocation are properly brought before the court for judicial action thereon that it has jurisdiction to revoke letters of administration or letters testamentary. (p. 134.)

EXECUTOR—Competency—Subsequent Disabilities.—A court, when asked to appoint the person whom a testator has nominated as executor, cannot refuse to make the appointment on the ground that reasons are alleged which warrant the belief that the executor will subsequently incur disabilities specified, or will so conduct himself that grounds for revocation of the letters will arise in the future. (pp. 134, 135.)

Dupee, Judah, Willard & Wolf, for the appellants.

Willis Smith, Henry L. Wallace and John W. Smith, for the appellee.

BOGGS, J. On the fifth day of February, 1902, one Jonathan Clark, of Chicago, departed this life, the owner of

real and personal estate of the value of six hundred thousand dollars. He left a will, which, together with the codicil thereto, was admitted to probate in the probate court of Cook county. By the will the deceased nominated and appointed Edwin F. Bailey, George T. Clark and the appellee, Caroline Patterson, executors thereof, and directed that bond should not be required of either of them. On the third day of March, 1902, the three executors named in the will joined in a petition to the probate court asking for letters testamentary. On the hearing of the petition for the issuance of letters, said Bailey and said George T. Clark were duly appointed and qualified as executors, but the appellants, being the widow and two of the five children of the testator, filed objections to the issuance of letters to the said Caroline Patterson, appellee. The objections were overruled and letters [537] ordered to issue to the appellee upon her presenting her separate bond as executrix, in the sum of twelve thousand dollars, conditioned as the statutes required and with sureties to be approved by the court. The court ordered that the other executors be permitted to qualify by giving their separate individual bonds in the same amount. From said order permitting the appellee to so qualify the appellants prosecuted an appeal to the circuit court of Cook county. Substantially the same objections presented to the probate court were refiled in the circuit court. The appellee moved the court to overrule the objections on the ground that, even if true, they were not sufficient, in law, to authorize the court to reject an executrix named by the testator. The court overruled the objections and approved and confirmed the order of the probate court directing letters testamentary to issue to the appellee, and ordered the objectors (appellants) to pay the costs in the circuit court. An appeal was perfected to the appellate court for the first district, where judgment was entered affirming the order of the circuit court. This is an appeal from such judgment of affirmance.

The only question presented in this appeal is, were the objections of the appellants properly overruled? The objections were as follows:

"1. That said Caroline Patterson is not a fit, competent, qualified or proper person to serve as executrix in said estate or to whom letters testamentary or otherwise should issue therein.

"2. That said Caroline Patterson has for a great many years last past held illicit sexual relations with said decedent, and has influenced his life so as to alienate his affection from his family.

"3. That said Caroline Patterson has for a great many years last past held intimate business relations with said decedent, acting as his secretary and business manager, and has, by reason of such relations, received property, both real and personal, from him while said illicit relations have [528] continued, and that the necessity exists that the executors of said estate and the heirs of said deceased contest with said Caroline Patterson the title and possession of such property; that by reason thereof she should not assume the trust imposed upon her in said will, as an executrix; that divers other good and sufficient reasons exist which these objectors will set forth and prove upon a hearing hereof, wherefor objectors object to the selection or appointment of said Caroline Patterson as executrix herein, and to the issuance of letters herein to said Caroline Patterson, or her selection and appointment in any capacity in connection with said estate.

"4. That said Caroline Patterson, for many years preceding the death of said decedent, sustained illicit sexual relations with him and which relationship amounted to an open state of adultery and fornication; that in the lifetime of said decedent said illicit relationship came to the knowledge of certain of the beneficiaries under said alleged will (including these objectors), and by reason thereof a feeling of hostility, antipathy, aversion and distrust arose, has existed and now exists between said Caroline Patterson and each and all of the members of the family of said decedent; that the granting of the application of said Caroline Patterson to qualify as executrix would outrage the feelings of the family of said decedent, would work serious disadvantage, inconvenience and great discomfort to the beneficiaries under the alleged will, would hinder and prevent the proper administration of said estate, would cause great and needless expense and loss, and would be contrary to the best interests of said estate and its beneficiaries; that one of said beneficiaries, George T. Clark, was nominated a coexecutor thereunder; that the knowledge of the former relationship that existed, as aforesaid, between said Carolina Patterson and decedent prevents said George T. Clark, so nominated as executor, from working in harmony with said Caroline Patterson, and from having confidence in her morality, integrity and judgment as executrix."

[529] The probate court proceeded correctly in granting letters of executorship to the appellee. Section 1 of chapter 3 of the statute on administration (1 Starr & Curtis' Statutes of 1896,

p. 269), provides: "That when a will has been duly proved and allowed the county court shall issue letters testamentary thereon to the executor named in such will, if he is legally competent and accepts the trust, and gives bonds to discharge the same," etc. The word "shall" is used in this statute in an imperative sense. In common and ordinary meaning the word has always a compulsory sense, though at times, upon sufficient reason, it may be construed as having only a permissive or directory meaning. Where the word is employed with reference to any right or benefit to anyone, and the right or benefit depends upon giving a mandatory meaning to the word, it cannot be given a permissive meaning, merely: Wheeler v. City of Chicago, 24 Ill. 105, 76 Am. Dec. 736; Fowler v. Pirkins, 77 Ill. 271; O'Rear v. Crum, 135 Ill. 294, 25 N. E. 1097. In the case last cited the meaning to be given the word "shall," as used in section 18 of the administration act, was determined. That section provides that "administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife or to the next of kin to the intestate," etc., and we held that the word "shall" related to the statutory right of a husband to administer upon the estate of his wife, and must be given an imperative construction. The same principle controls the interpretation to be given the word "shall" as used in section 1 of the same act with reference to the appointment of the person named in a will as the executor thereof. Said section 1, however, requires that the person so named to be executor shall be "legally competent" to accept and discharge the duties of the trust, and it therefore becomes important to determine whether the matters alleged in the objections established that the appellee was not legally competent to act as executrix.

Section 3 of the administration act, adopted April 1, 1872 (1 Starr & Curtis' Statutes of 1896, p. 270), and section 18 of [540] the same act, as amended by an act approved June 3, 1897 (4 Starr & Curtis' Statutes, p. 33), are the only statutory provisions relative to the competency of persons to serve as executors. Said section 3 is as follows: "Persons of the age of seventeen years, of sound mind and memory, may be appointed executors; but when a person appointed executor is, at the time of proving the will, under the age of twenty-one years, or of unsound mind, or convicted of any crime rendering him infamous, administration with the will annexed may be granted during his minority or other disability, unless there is another executor who accepts the trust, in which case the estate shall be admin-

istered by such other executor until the minor arrives at full age or the other disability is removed, when, upon giving bond as in other cases, he may be admitted as joint executor with the former. When a married woman is executrix, her husband may give bond with her for her faithful performance of the trust as in other cases." Section 18 declares a nonresident shall not be appointed as executor.

It is not contended that the objections preferred to the appointment of the appellee as executrix are such as to render her incompetent under either of said sections 3 or 18. Appellants contend that section 5 of the administration act authorizes the court to refuse letters testamentary to anyone who, in the sound judgment of the court, is "not qualified." Section 5 is as follows: "Where two or more executors are appointed in and by the same will, and one or more of them dies, refuses to take upon himself the executorship, or is otherwise disqualified, letters testamentary shall be granted thereon to the other person or persons so named, not renouncing as aforesaid, and not disqualified."

The purpose of that section is to direct the course to be pursued by the court when a testator has appointed two or more persons as executors and one or more of them have died or have refused to accept or are not legally competent to receive the appointment. The ancient rule of the common [541] law was, that if one named with others as executor had died or refused to qualify or accept, the others could not execute the will. The rule was modified by the statute of 21 Henry VIII, chapter 4; but this statute related only to cases where one or more of those nominated refused to accept: Wardwell v. McDowell, 31 Ill. 364; Clinefelter v. Ayres, 16 Ill. 329. Section 5 of our administration act was designed to establish the rule in Illinois in all cases in which all who were nominated executors could not or would not serve. The purpose of the section was to carry into effect, as far as possible, the wishes of the testator as to the person or persons to whom the control and management of his property should be committed, and not to create additional grounds or reasons for refusing to appoint the persons nominated by the testator as executors of his estate. Section 5 was not intended to, and does not, confer power on the court to prescribe additional grounds of competency or incompetency in granting letters testamentary. The words "otherwise disqualified" and "not qualified," employed therein, plainly

mean not otherwise legally incompetent or not legally competent under the statute. The objections to the granting of the letters of executorship to the appellee do not impute to her any statutory disqualification. If the person nominated by a testator as executor of his last will be "legally competent," the court cannot, on objections filed, cause an issue to be formed and enter upon an investigation of alleged moral delinquencies of such person, and refuse to grant letters to a person whom the testator has chosen to manage his property and execute his will, on the ground such person has been guilty of sexual immorality.

In re Plaisance, Myrick's Prob. (Cal.) 117, counsel for appellants contend supports their contention. It seems to have been decided in an inferior probate court in California. In that state the statute expressly declared that no person should be deemed competent to serve as executor who should be "adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want [542] of understanding or integrity." The holding was, that "the gross immoral associations surrounding the applicant, and the admission by him that he has 'lived by his wits' for that period, are grounds for refusing him letters. His mode of life is evidence that he would be incompetent to faithfully discharge the duties of the trust, and the gross immorality as shown by his mode of life is evidence, in itself, of great lack of integrity."

Counsel for appellee insist that this decision has been, in principle, overruled in Re Bauquier, 88 Cal. 302, 26 Pac. 178, 542, decided by the supreme court of that state. But it is sufficient to say that the decision in Re Plaisance was based solely upon the peculiar provisions of the statute of that state, and for that reason has here neither weight as authority nor persuasive force in principle. The same may be said as to In re Diller's Application, 6 Ohio Dec. 182, the decision being controlled by a special provision of the statute of the state of Ohio authorizing the court to refuse to appoint as administrator a person who is "evidently unsuitable." In appointing administrators, whether an applicant is "suitable" must be determined by the court. The testator in a will enjoys the right to determine who is most "suitable" to settle his affairs and execute his will, the only restriction on such right being that the person selected shall be "legally competent." In Re Bauquier, 88 Cal. 302, 26 Pac. 178, 532, the supreme court of California declared the correct general rule, as follows: "Under our

law a man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly declared by law; and within the same limitation he has the absolute right to select the executor to carry out the provisions of his will. In other words, the executor named in a will has the right to act unless there is some express provision of law which declares that he shall not, and as a consequence the testator may lawfully select any person for this trust who does not fall within one of the classes expressly mentioned and declared to be incompetent. And so far as our investigation 543 has extended, this construction has been uniformly given to statutes relating to this subject." In 11 American and English Encyclopedia of Law (second edition, page 751), it is said: "All persons capable of making wills, and others besides, are capable of being executors, except such as are expressly forbidden by law."

The objection that the appellee "has for a great many years last past held intimate business relations with decedent, acting as his secretary and business manager, and has, by reason of such relations, received property, both real and personal, from decedent while said illicit relations have continued, and that the necessity exists that the executors of said estate and the heirs contest with appellee the title and possession of such property," did not render the appellee legally incompetent to receive letters testamentary. It will be observed that it is only by way of inference (if at all) that it appears from the objections that the appellee improperly or without legal consideration received any property from the testator. Even if the fact that the coexecutors and heirs of an estate had or claimed grounds of action against another coexecutor to recover property as legally belonging to the deceased, constituted a statutory ground for refusing to issue letters testamentary to such coexecutor, the objection as here made would be too indefinite and uncertain to justify the refusal of letters. But the statute does not create such alleged adverse interest as a cause of disqualification. The General Assembly has enumerated in the statute the causes which operate to render one named as executor incompetent, and did not include an adverse interest as creditor of the testator, or want of harmony between such person and the heirs, or the like, in the grounds of disqualification. On the contrary, the right of a testator to appoint his debtor executor of his will (which, so far as we know, has never been denied), is expressly recognized in section 19 of our statute of wills. That

section provides that the appointment of a debtor of the intestate as executor of the will shall not operate [544] to release or extinguish the debt due from the executor to the testator, etc. Alleged indebtedness of an executor to the estate, even when the executor denies liability, thus making his interest directly antagonistic, does not create legal incompetency to serve as executor: Kidd v. Bates, 120 Ala. 79, 74 Am. St. Rep. 17, 23 South. 735, 41 L. R. A. 154.

Counsel for appellants urge that inability of one who has been appointed as executor, to co-operate with his coexecutors in the discharge of the affairs of the estate because of want of harmony between them, or because the beneficiaries under the will entertain a feeling of hostility against such executor, based upon substantial grounds, would authorize the court to revoke the letters of executorship, and that upon sound legal principles the court should not be required to appoint one as executor whom it would be the immediate duty of the court to remove. The legislature has not deemed it wise to confer on the courts unrestricted power to revoke letters of executorship, but has expressly declared the grounds on which such revocation may be ordered. It is only when one or more of such statutory causes are properly brought before the court for judicial action thereon that the courts have jurisdiction to revoke letters of administration or letters testamentary: Munroe v. People, 102 Ill. 406. The statutory grounds for revocation of letters testamentary are, that the will has been set aside by "due course of law" (section 29); that the executor has "become insane, lunatic or of unsound mind, habitual drunkards, are convicted of infamous crimes, waste or mismanage the estate, or who conduct themselves in such manner as to endanger their coexecutors, coadministrators or securities" (section 30,) and the effect of removal from the state is set forth in sections 31 and 32. Some one or more of the causes enumerated in section 30 must, of course, be relied on as grounds for revocation as applied to this case. But it is not pointed out, nor are we able to discover, that the matters alleged in the objections filed by the appellants to the appointment of appellee as executrix state [545] any statutory causes authorizing her removal, and which, if this argument of counsel be conceded, would empower the court to refuse to issue letters testamentary to her. It is, moreover, proper we should say that section 30 operates only to authorize the revocation of letters for disabilities of the executor occurring or discovered after his appointment, and that a

court, when asked to appoint the person whom a testator has chosen to be his executor, cannot refuse to make the appointment on the ground it is alleged there are reasons warranting the belief that the executor will subsequently incur the disabilities specified, or will so conduct himself or herself as that grounds of revocation will arise and exist in the future.

The judgment is affirmed.

An Executor derives his office from testamentary appointment; and if he is a person not disqualified by law from being an executor, the court has no right to refuse to permit him to qualify or to refuse to grant him letters testamentary: Berry v. Hamilton, 12 B. Mon. 191, 54 Am. Dec. 515, and note. At the common law all persons except idiots and lunatics were competent to act as executors; neither infancy, nonresidence, coverture, improvidence, ignorance, nor moral delinquency disqualified one for the office: Kidd v. Bates, 120 Ala. 79, 74 Am. St. Rep. 17. As to the effect on this common-law rule of a statute enumerating the grounds disqualifying an executor, see Kidd v. Bates, 120 Ala. 79, 74 Am. St. Rep. 17.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. CROSE.

[214 Ill. 602, 73 N. E. 865.]

CONTRIBUTORY NEGLIGENCE—Whether a Question of Law.—Contributory negligence is generally a question of fact, and becomes one of law only when the evidence so clearly fails to establish due care that all reasonable minds would reach the conclusion that there was such negligence. (p. 137.)

CONTRIBUTORY NEGLIGENCE—When a Question of Fact. If the evidence on the question of contributory negligence is in conflict, or if there is evidence fairly tending to support the verdict, or if reasonable minds might arrive at different conclusions, the question is one of fact for the jury, and its verdict, and the judgment of the trial court affirmed by the appellate court, are final and conclusive. (p. 137.)

RAILROADS—Excessive Speed—Presumption of Negligence. The violation of a speed ordinance by a railroad company is, under the Illinois statutes, prima facie, negligence rendering the company liable for damages occasioned thereby; and whether the evidence is sufficient to overcome this prima facie case is a question for the jury. (p. 137.)

RAILROADS—Negligence in Loading Car.—One Who Drives His Team Between the Tracks of a railroad company, at the direction of its agent, to unload wood from his wagon into the cars, has a right to assume that the company will not render his position hazardous by any act of negligence, and is not, while unloading,

bound to exercise that degree of care in looking and listening for approaching trains that would be required of him were he not so engaged. (p. 138.)

RAILROADS—Negligence in Loading Car.—One Who Drives His Team Between the Tracks of a railroad company, at the direction of its agent, to unload wood from his wagon into a car, is not, in respect to train running at a speed prohibited by ordinance, negligent as a matter of law. (p. 139.)

EVIDENCE—Photographs—Changed Conditions.—When the situation and surrounding circumstances are subject to change, photographs, to be admissible as evidence, must have been taken at the time of the transaction or when the situation and circumstances are unchanged. (pp. 139, 140.)

WITNESS—Impeaching Evidence.—Excluding a Paper from evidence which contains statements conflicting with the testimony of a witness is not prejudicial, when he admits signing the paper, and the questions and answers are read therefrom by counsel in presence of the jury. (p. 142.)

RAILROADS—Excessive Speed—Proximate Cause.—An Instruction that it is negligence on the part of a railroad to run its train through a city or village at a rate of speed forbidden by law, and if it does so run its trains and thereby injures the property of one who is himself in the exercise of reasonable care, it is liable, is not objectionable in failing to state that the proximate cause of the injury must be the unlawful speed, for, in effect, it does so state. (p. 143.)

RAILROADS—Excessive Speed—Presumption of Negligence.—An Instruction that when a railroad runs its trains through a city or village at a greater rate of speed than permitted by ordinance, and stock is injured by such trains, the injury will be presumed to have been done through the negligence of the railroad, does not direct a verdict and is not reversible error. (p. 144.)

Action for injuries to teams and wagons from being struck by a railroad train in the village of Milford. The plaintiff and his employés had driven their teams between the railroad tracks and taken a position alongside some cars, in order to unload wood from their wagons into the cars. While thus engaged in loading the wood into the cars, a passenger train approached at a high rate of speed, causing the damage complained of. There was a judgment for the plaintiff.

Freeman P. Morris, Frank L. Hooper, W. H. Lyford and E. H. Seneff, for the appellant.

Dyer & Wallbridge, for the appellee.

[605] Per CURIAM. At the close of appellee's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to find it not guilty. The court refused both requests, and that refusal is assigned as error.

The principal contention on this branch of the case is that appellee was guilty of such contributory negligence as should

bar a recovery. In cases of this kind the question as to whether or not a person was guilty of contributory negligence is generally one of fact for the jury, and only becomes a question of law when the evidence so clearly fails to establish due care that all reasonable minds would reach the conclusion that there was such contributory negligence: Hoehn v. Chicago etc. Ry. Co., 152 Ill. 223, 38 N. E. 549; Beidler v. Branshaw, 200 Ill. 425, 65 N. E. 1086. If the evidence on the question is in conflict, or if there is evidence fairly tending [606] to support the verdict, or if reasonable minds might arrive at different conclusions, it is a question of fact and must be submitted to the jury (Werk v. Illinois Steel Co., 154 Ill. 427, 40 N. E. 442), and its verdict, and the judgment of the trial court, affirmed by the appellate court, are final and conclusive.

It cannot be seriously contended that the evidence in this record does not make a case of prima facie negligence against the defendant company at the time of the accident. There was then in force in the village of Milford an ordinance making it unlawful for any railroad company to propel any engine or train upon any railroad track within the limits of the village at a greater rate of speed than ten miles per hour. This ordinance was pleaded in haec verba in one of the counts of the declaration and was introduced in evidence upon the trial. Section 87 of chapter 114 of Hurd's Statutes of 1903 provides, that whenever any railroad corporation shall run any train or engine or car at a greater rate of speed through the incorporated limits of any city, town or village than is permitted by any ordinance thereof, such corporation shall be liable to the party aggrieved for all damages done to persons or property by such train, engine or car, and the same shall be presumed to have been done by the negligence of said corporation or its agents. It is undisputed that the train which caused the injury in this case was running at a greater rate of speed than ten miles per hour, in violation of the village ordinance, and this being so, a prima facie case of negligence was established against the appellant (Illinois Cent. R. R. Co. v. Ashline, 171 Ill. 313, 49 N. E. 521) and the injury must be presumed to have been inflicted by the negligence of the appellant company or its agents operating such train, and in such case it would be liable for all damages occasioned thereby. Such presumption may be rebutted, but the question whether the appellant's evidence was sufficient, under all the circumstances, to overcome the prima facie proof of negligence was a question for the jury and was properly

submitted to it, and the judgment [607] of affirmance by the appellate court is conclusive: Louisville etc. R. R. Co. v. Spencer, 149 Ill. 97, 36 N. E. 91; Cleveland etc. Ry. Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052.

It is earnestly contended by counsel for appellant that the evidence so far fails to prove that the plaintiff was not himself guilty of contributory negligence as to resolve that question into one of law for the determination of the court. In support of this position it is insisted that the evidence shows that prior to the accident he had been hauling wood to Milford and loading it in cars on appellant's track, and was familiar with the situation, sidetracks and all other surroundings; that he knew the team which was killed was afraid of the cars, and also that the fast train which caused the injury was due at the time he drove between the tracks; that he did not look or listen for the train, and after he heard it whistle at the bridge he had sufficient time to unfasten the team and thus avoid the accident, and that there is no evidence tending to show that the speed of the train in any way contributed to the accident. There is evidence to the effect that on the morning of the accident appellee applied to the agent of the appellant company for cars to be loaded with wood, and asked the agent to permit him to load the cars farther north of the place of the accident, on a sidetrack near the elevator, so that he could approach the track from the east side and not be compelled to enter the space between the sidetrack and the main track, but was informed by the agent that the sidetrack farther north was occupied by other parties and he would have to load his cars between the tracks. It must be inferred from this evidence that he was attempting to unload his wood into the cars at the place of the accident and drove his team in the space between the tracks by the direction of the defendant or its agent, and he therefore had the right to assume that the defendant would not render his position hazardous by any act of negligence on its part: Chicago etc. Ry. Co. v. [608] Goebel, 119 Ill. 515, 10 N. E. 369. As to his duty to watch and listen for approaching trains, it must be borne in mind that he had the right to presume that such trains would be run with proper care, and also that he and his men were rightfully engaged in unloading the wood at the time, and therefore were not bound to exercise that degree of care in looking and listening which would have been required of them had they not been so engaged. The evidence further tends to show that the car farthest south upon the sidetrack was larger than

the other cars, and on account of its size and the curve of the track it obstructed the view of an approaching train; also, that no whistle was sounded or bell rung upon the approaching train, and that the first knowledge appellee had of the danger was the smoke from the engine as it appeared over the top of said southernmost car, and from the time the smoke was so seen until the train passed causing the injury there was not sufficient time within which to remove the horses or otherwise avoid the accident. It was also further shown that on account of the train being late appellee supposed that it had already passed before he drove in the space between the tracks. It is true that as to most of these facts there is an irreconcilable conflict in the evidence, but it cannot, we think, be seriously claimed that there is no competent testimony fairly tending to establish them, or that, considered together, they do not fairly tend to prove that the plaintiff was at the time of the injury in the exercise of ordinary care for the safety of his property. Unless it can be said that he was guilty of negligence in driving his team between the tracks the evidence clearly justifies the conclusion that he was not guilty of contributory negligence; and we think it equally clear that it cannot be said, as a matter of law, that he was negligent in so driving between the tracks. As already said, he was there in the lawful transaction of business with the defendant company and by the direction of its agent. The trial court properly refused to take the case from the jury.

The defendant offered in evidence three photographs, which, on objection by counsel for plaintiff, were excluded, and this is assigned for error. The appellee, who drove the fourth wagon and came up behind the other three between the tracks, testified that he was unable to see the approaching train when it reached the bridge, which is about a half mile south of the place of the accident, because the corner of the south car, located at a point where the sidetrack curved to the west to join the main track, projected over the west side of the sidetrack about two feet and thus obstructed the view to the south. The photographs were offered for the purpose of contradicting this testimony by showing that the view was not obstructed in the manner stated, and also for the purpose of showing the location of the tracks and cars at the place of the accident. Photographs offered in evidence for the purpose of contradicting witnesses or explaining a transaction are only competent when they are shown to have been so taken as to correctly exemplify the actual situation, circumstances and surroundings at the time.

When the situation and surrounding circumstances are subject to change, photographs, to be of any value as evidence, must be shown to have been taken at the time or when the situation and surroundings are unchanged: Chicago etc. R. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739; Lake Erie etc. R. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573. In this case the evidence shows that the photographs were taken twelve months after the transaction. The situation as to cars on the sidetrack and the approaching fast train had necessarily changed. An attempt was made by the agent of the company to replace similar cars in similar positions on the sidetrack, but he testified that he did not know just exactly how far it was from the main track to the south car, but says that after he looked the situation over "he could tell within a few feet of it." He took no actual measurements of the situation as it existed on the day of the accident. One of the witnesses, in testifying in regard to the photographs, says as to the location of the [610] cars as shown by them, "Of course, it might have varied a few feet." The offered photographs do not show wagons alongside the cars in the space between the sidetrack and the main track, although it is undisputed that there were three wagons ahead of the one on which appellee was sitting when he testified he first saw the smoke from the engine. There were piles of lumber both east and west of the sidetrack at the time of the accident, and the photographs do not show them. It also appears from the evidence that one of the cars placed on the sidetrack for the purpose of taking the photographs was different in size from the one which stood there at the time of the accident. Another witness called to verify the correctness of the photograph says, "We stood a car as near as we could remember where the car stood, just about a year after the accident." It needs no argument to show that a variation of a few feet in the location of the cars might make a vast difference as to whether the view was obstructed at the time of the injury or not. The testimony of the appellee is that he was on the east side of his wagon, next to the cars on the sidetrack, when he discovered the smoke. Only one of the photographs offered in evidence purports to have been taken while the photographer stood with his instrument in the neighborhood of the place where appellee was at that time. A photograph taken under the circumstances shown by the evidence in this case would certainly be incompetent to contradict the testimony of the plaintiff below, and would have tended rather to mislead and confuse the jury than to enlighten them. A colored plat or

map showing the location of the tracks and the situation was introduced in evidence. It is admitted by counsel for appellant that this map gave a general idea of the tracks and surroundings at the place. Witnesses were also introduced by the defendant who testified to the effect that the view of the track from the direction of the approaching train was unobstructed as far south as the bridge, thus contradicting the testimony of the plaintiff sought to be disproved by the photographs. [611] We are clearly of the opinion that the pictures or photographs offered in evidence and objected to by counsel for the plaintiff were, under the evidence in the case, incompetent and properly excluded. But if it were otherwise, the exclusion of the testimony worked no injury to the defendant: Cleveland etc. Ry. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869.

One Samuel Lyons drove the first team that entered the space between the tracks and stopped alongside the south car. In his testimony as a witness for the plaintiff, on direct examination he said: "I saw the smoke before I saw the train, and the train then came in sight in a short time; I just got hold of my horses; as I remember, I was on my wagon then and jumped down; I don't think any of these parties had unloaded any wood from these four loads before the train came." Upon cross-examination his attention was called to a statement which he had made a few days after the accident, before a police magistrate by the name of Cleaver, and was asked if this question was not put to him by Cleaver at that time: "State fully how the accident occurred and what the injured person was doing when it happened; where were you at the time of the accident and what were you doing?" And whether he did not make the following reply to that question: "Can't say just how the accident occurred, but do know that the injured person was unloading wood from a wagon into a car standing on the east switch; I had charge of one of the teams hauling wood, and as soon as I saw the train approaching went to the head of my horses so as to hold them, and was so engaged at the time of the accident." The object of this examination was to impeach the witness by showing that he had, in the prior statement made by him, contradicted what he said as a witness upon the trial. At the trial he said he did not think that any one of the parties had unloaded any wood before the train came, whereas in the statement made before the magistrate he had stated that the injured person—that is, Hevron—was unloading wood [612] from a wagon into a car standing on the east switch. The trial court

refused to admit the written statement, and this is charged to be error. An examination of the testimony of the witness will show that he admitted that he made the statement in question before Cleaver, the magistrate. He said: "The paper which you show me . . . . has my signature on the back of it; I signed it on February 7, 1901; Cleaver wrote it out for me and read it over to me; I think, as well as I can remember, that he asked me the questions; I gave Cleaver the information from which he wrote down these answers; I think he then read the paper over to me and I then signed it; this was at Mr. Cleaver's office at Milford, on February 7, 1901." In Illinois Cent. R. R. Co. v. Wade, 206 Ill. 523, 532, 69 N. E. 565, 568, we said: "If a witness admits that he made statements imputed to him to have been made, as fully as claimed to have been made, further proof of the fact may be unnecessary; but when the witness denies or does not directly admit that he made the statement, the impeaching proof should be permitted to be given." It appears here that the question as claimed by counsel for appellant was addressed to the witness and that he made the answer which he is charged with having made. In view of this admission the fact of the contradiction was before the jury even though the written statement made before the police magistrate was excluded. In addition to this, Cleaver, the magistrate, was placed upon the stand by the defendant and asked if he did not address the question set forth in the written statement to Lyons, and if he did not make an answer thereto, also set forth in the written statement. He testified that he asked Lyons the question and that Lyons gave the answer set forth in his statement. It is evident, therefore, that appellant could not have received any greater benefit from the introduction of the written statement itself than it had from the proof thus introduced of what was in the written statement. And again, inasmuch as the question and answer sought to be introduced to the jury were read from the paper in their [613] presence, in connection with the testimony of Cleaver, it is impossible to see how the appellant was prejudiced in any way because the paper itself was not admitted in evidence.

Appellant sought to prove the result of a certain experiment made by a witness, Borg, with a board two and one-half feet wide, which it was claimed was placed approximately where the south end of the south car stood at the time of the accident, and that, standing back and looking to the south, it furnished no obstruction to the view of the track. The object of this

testimony was to contradict appellee as to the south car obstructing his view of the approaching train. The court refused to admit the testimony, and we think properly. The position and width of the board and the position of the witness Borg were altogether dissimilar from the situation of the car and the plaintiff, according to his testimony. Such an experiment would in no way tend to disprove the testimony of the plaintiff. As we have already said, the court had permitted witnesses, who testified that they were familiar with the situation and location at the time of the accident, to state how far the track could be seen south by the person standing between the main and sidetracks north of where the accident occurred, under the conditions that existed at the time of the accident. We find no substantial error in the rulings of the trial court upon admission or exclusion of testimony.

It is insisted that the court erred in giving the second, third and fourth instructions on behalf of the plaintiff. The second is as follows: "The court instructs the jury that it is negligence on the part of a railroad company to run its trains through a city, incorporated town or village at a rate of speed prohibited by law, and if a railroad company does so run its trains, and thereby injures or destroys the property of a person who is himself in the exercise of reasonable care and caution to avoid injury to such property, the company will be liable."

The insistence is that the instruction fails to state that the proximate cause of the injury must be the unlawful speed of [614] the train. We do not think the instruction should be so construed. The language is, "if a railroad company does so run its trains, and thereby injures or destroys the property of a person." This means that if a railroad company runs its train at a prohibited rate of speed, and thereby—that is, by so running at a prohibited rate of speed—it injures the property of another, the company will be liable. The word "thereby" refers to the unlawful rate of speed, and therefore the instruction does, in effect, require the speed of the train to be the proximate cause of the injury.

The third instruction is as follows: "The court instructs the jury that when a railroad company runs its trains through a city, incorporated town or village at a greater rate of speed than is permitted by the ordinance of the city, town or village, and stock is killed or injured by said train while so running, the injury will be presumed to have been done through the negligence of the railroad company."

This instruction is almost in the exact language of the statute, and one quite similar to it was given in Chicago etc. R. R. Co. v. Haggerty, 67 Ill. 113, and Illinois Cent. R. R. Co. v. Ashline, 171 Ill. 313, 49 N. E. 521. The instruction does not direct a verdict, as contended, and, taken in connection with all the others given, we do not think it was so misleading as to constitute reversible error.

The fourth instruction is as follows: "The jury are instructed that by the laws of this state if a railroad company, by its agents or servants, runs an engine or train of cars in or through the limits of any incorporated city, town or village at a greater rate of speed than is permitted by the ordinance of such city, town or village, then the company is liable for all damages done to the property of any person injured by such engine or train of cars, provided the person injured is exercising due care for his property at the time in question."

615 The criticism made upon this instruction is, that it fails to state that the unlawful speed of the train must have been the proximate cause of the injury, and that it in express terms declares a fixed and absolute liability. It is doubtless subject to criticism, and standing alone might have been calculated to mislead the jury to the prejudice of the defendant. The second instruction given on behalf of the plaintiff covers the same point, as does also the seventeenth given on behalf of the defendant. The latter tells the jury that although the law presumes that where a train is run at a rate of speed in excess of that fixed by the ordinance, and property is injured, and the injury was the result of negligence on the part of the company, yet such presumption of negligence may be rebutted by the evidence, and if the jury believe that the injury in question was not caused by the train running at a speed in violation of the ordinance, but that the injury was caused by appellee's horses becoming frightened at the train, and that the horses were not frightened by reason of the speed of the train but because they were afraid of a locomotive, then the appellee cannot recover upon the ground, alone, that the train was running at a greater rate of speed than that fixed by the ordinance. This instruction clearly covers the defect complained of in the foregoing fourth given on behalf of appellee.

On behalf of appellant eighteen carefully prepared instructions were given to the jury, which, when considered as a series and in connection with those given at the instance of plaintiff, covered every material question in the case. It cannot, we

think, be said that the verdict of the jury was in any way the result of misdirection as to the law.

We have endeavored to give careful consideration to each of the numerous points made by counsel for the appellant in their argument urging a reversal of the judgment below, and are convinced no reversible error was committed.

The judgment of the appellate court will be affirmed.

Running a Train Through a City at a Rate of Speed forbidden by law is negligence: Chicago etc. R. R. Co. v. Mochell, 193 Ill. 208, 86 Am. St. Rep. 318, and cases cited in the cross-reference note thereto. See, too, Duval v. Atlantic Coast Line R. R. Co., 134 N. C. 331, 101 Am. St. Rep. 830; Anniston Elec. etc. Co. v. Hewitt, 139 Ala. 442, 101 Am. St. Rep. 42; Kinyon v. Chicago etc. Ry. Co., 118 Iowa, 349, 96 Am. St. Rep. 382. One who is injured by such a train, however, must, in order to recover therefor, be free from contributory negligence: Reidel v. Philadelphia etc. R. R. Co., 87 Md. 153, 67 Am. St. Rep. 328; Blanchard v. Lake Shore etc. Ry. Co., 126 Ill. 416, 9 Am. St. Rep. 630.

Photographs as Evidence are discussed at length in the monographic note to Baustian v. Young, 75 Am. St. Rep. 468-479.

CASES

IN THE

SUPREME COURT

OF

KANSAS.

MAYNES v. GRAY.

[69 Kan. 49, 76 Pac. 443.]

COMPUTATION OF TIME.—The Word "To" in an order extending time in which to make and serve a case for the supreme court "to the fifteenth day of March," is a word of exclusion, so that the time granted expires at 12 o'clock midnight, March 14th. (p. 147.)

C. W. Reeder and Ryan & Ryan, for the plaintiff in error.

Arthur C. Bell, for the defendant in error.

49 ATKINSON, J. Upon the application of plaintiff in error, February 25, 1902, the judge of the district court at chambers extended the time for making and 50 serving a case "to the fifteenth day of March, 1902." The case was served on the fifteenth day of March, 1902. Defendant in error has moved to dismiss the proceedings in error from this court on the ground that the time allowed by the district judge for making and serving the case had expired when service of the same was made. The determination of this question calls for the meaning of the word "to" as used in the order of the judge extending the time for making and serving the case.

Bouvier's Law Dictionary defines the word "to" as "a term of exclusion, unless by necessary implication it is manifestly used in a different sense." Substantially the same definition is given in the American and English Encyclopedia of Law. In the following cases the word "to" has been used and applied as a term of exclusion: State v. Libby, 84 Me. 461, 24 Atl. 940; Stearns v. Sweet, 78 Ill. 446; Wells v. Iron Mfg. Co., 48 N. H.

491; Schumacker v. Toberman, 56 Cal. 508; People v. Jones, 112 N. Y. 597, 605, 20 N. E. 577.

The court of appeals, in the case of Garden City v. Bank, 8 Kan. App. 785, 60 Pac. 823, held that an order of the trial judge extending the time for making and serving a case "to March 22," expired March 21st at midnight. In the case of People v. Robertson, 39 Barb. 9, the court, in passing upon the question of the termination of a lease of premises "from the first day of May, 1856, to the first day of May, 1862," held that the sublessee's rights under the lease expired at 12 o'clock midnight on the 30th of April, 1862.

Webster recognizes the words "to," "till" and "until" as synonymous, in the sense here used. The Century Dictionary gives a like recognition to their use. This court held, in the case of Croco v. [51] Hille, 66 Kan. 512, 72 Pac. 208, that the service of a case on June 20th, under an order which allowed "until June 20th" to make and serve a case for this court, was made after the time granted had expired. In the case of State v. Dyck, recently decided by this court, 68 Kan. 558, 75 Pac. 488, it was said that where appellant was given "until May 4, 1903, within which to prepare and have settled a bill of exceptions" the time given expired May 3d. The word "to," as used in the order of extension, is a term of exclusion, and excluded the fifteenth day of March. The time granted by the order of extension for serving a case expired at 12 o'clock midnight, March 14th.

The case-made was not served in time, and the motion of defendant in error must be sustained. The proceedings in error will be dismissed.

All the justices concurring.

The Computation of Time is the subject of a monographic note to State v. Michel, 78 Am. St. Rep. 372-386. See, too, the subsequent cases of Aultman v. Syme, 163 N. Y. 54, 79 Am. St. Rep. 565; Elder v. Horseshoe Min. etc. Co., 15 S. Dak. 124, 102 Am. St. Rep. 681.

BILLARD v. BOARD OF EDUCATION OF TOPEKA.

[69 Kan. 53, 76 Pac. 422.]

PUBLIC SCHOOL—Religious Teachings.—A teacher who, to quiet the pupils and prepare them for their work, repeats the Lord's Prayer and the Twenty-third Psalm as a morning exercise, without response, comment or remark, the only demand on the pupils being that they should demean themselves in an orderly manner, does not conduct a form of religious worship or teach a sectarian or religious doctrine. (p. 151.)

N. B. Arnold, G. C. Clemens and David Overmeyer, for the plaintiff in error.

J. W. Gleed, J. L. Hunt, Gleed, Ware & Gleed and D. E. Palmer, for the defendant in error.

[53] GREENE, J. The plaintiff sought by mandamus in the district court of Shawnee county to compel the board of education to permit his son Philip to re-enter [54] one of the schools of the city from which he had been expelled for persistently disobeying its rules. Trial was had and judgment rendered in favor of the board, to reverse which plaintiff prosecutes this proceeding in error.

The plaintiff was a resident taxpayer in that part of the city of Topeka attached to the Quincy school for school purposes. His son Philip was a regularly enrolled pupil therein for the school year 1903-04, and a regular attendant from the opening of the school until January 9, 1904, when he was expelled. The general opening exercises of the school consisted of repeating the Lord's Prayer and the Twenty-third Psalm, of reading selections from natural history—generally from Ernest Thompson Seton's stories—and of singing occasionally a selection found in "The Normal Music Course, Second Reader, Part 1." The pupils were not required to take part in these exercises, but they were required to refrain from their regular studies and preserve order during that period. The time spent in repeating the Lord's Prayer and the Twenty-third Psalm occupied from two to three minutes, the entire general exercises occupying about fifteen minutes.

The plaintiff made complaint that his son Philip was required to desist from studying and to remain orderly during these morning exercises, stating that he was conscientiously opposed thereto because such exercises were a form of religious worship. Thereafter Philip was excused from attending these

exercises, and was permitted to enter the schoolroom fifteen minutes after the regular hour. For a time he so absented himself, but later entered the room with the other pupils and persisted in disobeying this rule. After repeated admonitions from his teacher and reproofs [55] for his disobedience, and upon a positive refusal to obey, he was expelled until such time as he should feel that he could return and give obedience.

The plaintiff made a written request to the board of education that his son be permitted to enter the schoolroom at the regular hour, and that he be allowed to pursue his regular studies during the morning exercises. Upon receipt of such request, the board passed the following resolutions:

"Resolved, That we hereby approve and sustain the action of W. H. Wright, principal of Quincy school, in suspending Philip Billard from school on January 9th for a persistent violation of our rule requiring pupils to refrain from studying during general exercises; and

"Resolved, That the pupil can be reinstated, as in other cases of suspension, by expressing his willingness to comply with the rules of the school."

A copy of these resolutions, together with the following communication, was sent to the plaintiff:

"In reference to the communication handed by one of your attorneys to the president of the board of education, permit me to say as follows: The communication was read to the board and ordered placed on file. In answer to the communication, the board of education passed a resolution, a copy of which is handed you with this letter. Yours very truly,

"J. E. STEWART,

"Clerk."

The plaintiff thereupon instituted this action.

The basis of plaintiff's grievance is that the daily repetition of the Lord's Prayer and the Twenty-third Psalm is a form of religious worship, to which he and his son are conscientiously opposed; that to conduct such exercise in the public schools, which are maintained at public expense and to the support of which plaintiff, as a taxpayer, is compelled to contribute, [56] is a violation of section 7 of the Bill of Rights, which reads as follows: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted."

He also claimed that it was a violation of section 8 of article 6 of the constitution, which reads: "No religious sect or sects shall ever control any part of the common school or university funds of the state."

He further insisted that it is prohibited by section 6284 of the General Statutes of 1901, which is as follows: "No sectarian or religious doctrine shall be taught or inculcated in any of the public schools of the city; but nothing in this section shall be construed to prohibit the reading of the Holy Scriptures."

There can be no question of the correctness of the legal premises of plaintiff. Both our constitution and statutes prohibit all forms of religious worship or the teaching of sectarian or religious doctrine in the public schools. Section 7 of the Bill of Rights contains the following provision: "Nor shall any person be compelled to attend or support any form of worship." That is, no person shall be compelled to pay tithes or taxes to secure or maintain a place where any form of religious worship shall be conducted, or where any sectarian or religious doctrine is taught; nor shall any form of religious worship be conducted, or any sectarian or religious doctrine be taught, in any place supported by the imposition of taxes. Lest there might be some misunderstanding, the legislature, in providing for a system of public schools in cities of the first class, enacted section 6284, supra, which in positive [57] terms prohibits the teaching of sectarian or religious doctrine.

However, there is nothing in the constitution or statute which can be construed as an intention to exclude the Bible from the public schools. Section 2 of article 6 of the constitution imposes upon the legislature the duty to "encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools." Every pupil who enters a public school has a right to expect, and the public has a right to demand, of the teacher that such pupil shall come out with a more acute sense of right and wrong, higher ideals of life, a more independent and manly character, a higher conception of his duty as a citizen, and a more laudable ambition in life, than when he entered. The system ought to be so maintained as to make this certain. The noblest ideals of moral character are found in the Bible. To emulate these is the supreme conception of citizenship. It could not, therefore, have been the intention of the framers of our constitution to impose the duty upon the legislature of establishing a system

of common schools where morals were to be inculcated and exclude therefrom the lives of those persons who possessed the highest moral attainments.

As to the purpose of these exercises the teacher of the Quincy school testified as follows: "Q. What was the purpose of repeating the Lord's Prayer? A. It is necessary to have some general exercise after the children come in from the playground to prepare them for their work. You need some general exercise to quiet them down. Q. What was the purpose in repeating the Twenty-third Psalm? A. The same. Q. Your purpose was a religious one, wasn't it? [58] A. My purpose was to prepare the children for their work, to quiet them from the outside— Q. Do you say your purpose was not religious? A. Well, I don't know as I can change my opinion; it was religious to the children that are religious, and to the others it was not."

An examination of the evidence convinces us, as it convinced the learned judge who tried the cause, that the exercises of which plaintiff complained were not a form of religious worship or the teaching of sectarian or religious doctrine. There was not the slightest effort on the part of the teacher to inculcate any religious dogma. She repeated the Lord's Prayer and Twenty-first Psalm without response, comment or remark. The pupils who desired gave their attention and took part; those who did not were at liberty to follow the wandering of their own imagination. The only demand made of them was that during these exercises they should demean themselves in the same orderly manner required during their general studies.

The judgment of the court below is affirmed.

All the justices concurring.

RELIGIOUS AND SECTARIAN TEACHING IN THE PUBLIC SCHOOLS.

I. Constitutional and Statutory Provisions.
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- **b. Favoring Religious Instruction, 152.**

II. Exercises of a Religious Nature.
- **a. Offering Prayer and Singing Hymns, 152.**
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VI. Use of Church for School Purposes, 157.

I. Constitutional and Statutory Provisions.

a. In General—Whether Self-executing.—Declarations against the giving of religious and sectarian instruction in the public schools or the using of public funds for the support of religious and sectarian institutions, are found in many, if not most, of the constitutions of the American commonwealths: See State v. Scheve, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927; Synod of Dakota v. State, 2 S. Dak. 366, 50 N. W. 632, 14 L. R. A. 418; note to County of Cook v. Industrial School, 8 Am. St. Rep 414. These constitutional provisions are self-executing, requiring no act of the legislature to make them operative: Synod of Dakota v. State, 2 S. Dak. 366, 50 N. W. 632, 14 L. R. A. 418. See, too, County of Cook v. Industrial School, 125 Ill. 540, 8 Am. St. Rep. 386, 18 N. E. 183, 1 L. R. A. 437.

b. Favoring Religious Instruction.—A constitutional provision declaring that religion, morality, and knowledge being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction, does not require religious instruction, nor the reading of religious books, in the public schools: Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233.

A statute of Iowa declaring that "the Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian," has been held not in conflict with a constitutional provision: "The General Assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship or the maintenance of any minister or ministry": Moore v. Monroe, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475.

II. Exercises of a Religious Nature.

a. Offering Prayer and Singing Hymns.—The supreme court of Massachusetts has decided that a school committee may pass an order that the schools of the town shall open each morning with prayer and reading from the Bible, and that during prayer each pupil shall bow his head, unless his parents request that he shall be excused from doing so; and may exclude from school a pupil who refuses to comply with the order, and whose parents refuse to request that he shall be excused: Spiller v. Woburn, 94 Mass. (12 Allen) 127. And the supreme court of Iowa has expressed the opinion that a schoolhouse is not made a place of worship by the teachers occupying a few minutes in the morning in reading selections from the Bible, repeating the Lord's Prayer, and singing religious songs; and that such exercises will not be enjoined at the suit of a taxpayer whose children are not required to be present during the time thus

occupied: Moore v. Monroe, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475.

And the court of appeals of Kentucky has very recently decided that the offering of a prayer by the teacher in opening a public school does not make the school sectarian, within the meaning of a provision of the constitution prohibiting the appropriation of educational funds in aid of sectarian schools; and that a school opened with prayer and readings without comment from King James' translation of the Bible, during which pupils are not required to attend, is not a place of worship, nor are its teachers ministers of religion, within the meaning of a provision of the constitution that no person shall be compelled to attend any place of worship or contribute to the support of a minister of religion: Hackett v. Brooksville School Dist. (Ky.), 87 S. W. 792, 61 Cent. L. J. 49.

But the supreme court of Nebraska has held, and very properly so we believe, that exercises by a public school teacher consisting of reading passages from the Bible, singing hymns with the scholars, and offering prayer in accordance with the doctrines, beliefs, and customs of sectarian churches or religious organizations, constitute religious worship and are sectarian in character, within the meaning of the state constitution: State v. Scheve, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927. The constitution of Nebraska provides that no person shall be compelled to attend, erect or support any place of worship against his consent; and no sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes.

b. **Reading from the Bible.**—In the principal case (ante, p. 148), it is decided that a teacher in a public school who, in order to quiet the pupils and prepare them for their regular studies, repeats the Lord's Prayer and the Twenty-third Psalm as a morning exercise, without comment or remark, the only demand on the pupils being that they demean themselves in an orderly manner, does not conduct a form of religious worship or teach a sectarian or religious doctrine. And in Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256, it is decided that a school committee may require, on pain of expulsion, that the pupils use the Protestant version of the Bible as a reading book. The constitutional provisions relied upon by the plaintiff in this case, who was a pupil who refused to read from the Bible, are as follows: "No one shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship"; and "no subordination nor preference of any sect or denomination to another shall be established by law."

In Pfeiffer v. Board of Education of Detroit, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536, it is held that the use in the public schools

for fifteen minutes at the close of each day's session of a supplemental text-book on reading entitled, "Readings from the Bible," largely made up of extracts from the Bible emphasizing the precepts of the Ten Commandments, the teachers being forbidden to make any comments upon anything in the book and being required to excuse from these exercises any pupil upon the application of his parent or guardian, does not offend the constitution of the state. Justice Moore dissented from the opinion of the majority of the court. The constitution of Michigan provides that the legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect or support any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion; that no money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose; and that the legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning religion.

In the recent case of Hackett v. Brooksville School Dist. (Ky.), 87 S. W. 792, 61 Cent. L. J. 49, it is decided that the King James translation of the Bible, or any edition of the Bible, is not a sectarian book; and when used merely for reading in the common schools without note or comment by the teacher, is not sectarian instruction; nor does such use of the Bible constitute the schoolhouse a house of religious worship.

Perhaps the ablest decision on this question is State v. District Board of Edgerton, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967, 7 L. R. A. 330. It is there decided that the reading of any version of the whole Bible in the common schools as a text-book, without restriction, and not accompanied by any comment by the instructor, is sectarian instruction, prohibited by the constitution of the state; and the prohibition is not removed by the fact that any child may withdraw from the schoolroom during the reading. It is also decided that Bible reading in the common schools as a text-book is religious worship, and constitutes the schoolhouse, for the time being, a place of worship, within the meaning of a constitutional declaration that no man shall be compelled to erect or support any place of worship. It is further held that money drawn for the support of a school wherein such reading is practiced is for the benefit of a religious seminary within the meaning of the provision of the constitution prohibiting such appropriation of public funds. The court expresses the opinion, however, that the constitutional prohibition against the reading of the Bible in the common schools as a text-book does not extend to such other text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom not sec-

tarian in their character. The decision of the Wisconsin court is approved in State v. Scheve, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927, and to our mind it establishes a safe and sound precedent.

c. **Chapel Exercises.**—The provision of the constitution of Illinois that no person shall be required to attend or support any ministry or place of worship against his consent is not violated, according to North v. Board of Trustees of University of Illinois, 137 Ill. 296, 27 N. E. 54, by a rule of the state university requiring students, unless excused, to attend chapel exercises. These exercises were held daily in the morning, and did not take over five or ten minutes' time. Religious hymns were sung, and one member of the faculty would read from the New Testament, repeat the Lord's Prayer, and sometimes give brief talks. It was not contended that the exercises were sectarian, but that they were in part religious worship within the constitutional prohibition. "In the view we take of the case," said the court, "that fact may be conceded. The real question on this branch of the case is, Was it a violation of the constitutional provision for respondents to adopt the rule, and require obedience thereto by those attending the university, unless excused therefrom? . . . . We are clearly of the opinion that the rule is not unlawful."

III. Employment of Sectarian Teachers.

A board of school directors cannot be enjoined from employing teachers exclusively of the Catholic faith, nor from permitting them to act as such while wearing the distinctive sectarian garb, crucifixes, and rosaries of the order of St. Joseph, to which they belong, provided they do not give any religious instruction during school hours, nor engage in religious exercises of any character whatever: Hysong v. Gallitzin School Dist., 164 Pa. St. 629, 44 Am. St. Rep. 632, 30 Atl. 482, 26 L. R. A. 203, Justice Williams, dissenting. The constitution of Pennsylvania declares that no money raised for the support of the public schools of the commonwealth shall be appropriated to the use of any sectarian school. Generally speaking, the school authorities may employ a teacher who belongs to any or to no church, as they may think best: Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669.

IV. What Constitutes a Sectarian Institution.

The question of what constitutes a sectarian school or institution has engaged our attention in a former note in this series: See 8 Am. St. Rep. 411-414. The reader is referred to that note for a discussion of the earlier decisions on this point. According to County of Cook v. Industrial School for Girls, 125 Ill. 540, 8 Am. St. Rep. 386, 18 N. E. 183, 1 L. R. A. 437, a school is sectarian, and comes within the constitutional provision that public funds shall not be paid out in aid of any sectarian purpose, or in aid of any school, etc., controlled

by any church, where such school is a corporation organized as an industrial school for girls, but does not lease or own any building, although its charter contemplates that it shall have a situs, nor otherwise comply with the provisions of its act of incorporation, but places girls nominally committed to it under the sole charge, care and control of two institutions controlled by a church, where they are taught, maintained and clothed by them alone, and in which institutions the inmates, although not obliged to receive instructions in the Romish faith, are yet taught no other faith or creed; and a suit to recover for tuition and for clothing furnished the girls cannot be maintained against the county.

The holding of the Illinois case is approved in Synod of Dakota v. State, 2 S. Dak. 366, 50 N. W. 632, 14 L. R. A. 418. It is there held that where a Presbyterian institution has a university under its control where secular and sectarian instruction is given to pupils, such university is sectarian, so that tuition cannot be recovered for a class of students instructed for the state in methods of teaching.

V. Use of Schoolhouse for Religious Meetings.

The voters of a school district are competent to declare that the schoolhouse shall not be used for religious purposes: Eckhardt v. Darby, 118 Mich. 199, 76 N. W. 761. And school officers have authority to prohibit the use of a schoolhouse for religious services and worship, when the building and its contents are being damaged, notwithstanding the land on which the house is situated was conveyed to trustees for the purpose of religious worship, and by them was conveyed to the school directors for a like purpose, and the building was erected in part by subscriptions, with the understanding that it should be so used under the charge of the directors: Boyd v. Mitchell, 69 Ark. 202, 62 S. W. 61.

On the other hand, some authorities hold that the electors of a district may legally permit the use of the schoolhouse for religious meetings: Townsend v. Hagan, 35 Iowa, 194; Davis v. Boget, 50 Iowa, 11. The Iowa constitution provides that no person shall be compelled to pay tithes, taxes, or other rates for building or repairing places of worship, or for the maintenance of any minister or ministry. Under a somewhat similar constitutional provision it is held in Nichols v. School Directors, 93 Ill. 61, 34 Am. Rep. 160, that a statute authorizing school directors to grant the temporary use of public schoolhouses when not occupied by schools, for religious, literary and other meetings, and for evening and Sunday schools, is not unconstitutional.

The better doctrine is, that public school officers have no authority to permit the use of school buildings for sectarian religious meetings or Sunday schools: Dorton v. Hearn, 67 Mo. 301; Hirsh v. Wenger, 182 Pa. St. 246, 38 Atl. 135. And if they attempt to do so, an objecting taxpayer may have such use enjoined: Hurd v. Walters, 48 Ind. 148.

See, too, Spencer v. Joint School Dist., 15 Kan. 259, 22 Am. Rep. 268; State v. District Board of Edgerton, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967, 7 L. R. A. 330. The people of a school district have no right to use the schoolhouse for religious meetings and Sunday schools, against the objection of a taxpayer, even though the district may have voted to allow such use: Schofield v. Eighth School Dist., 27 Conn. 499.

The trustees of a school district have no authority to allow the schoolhouse to be used for public and private dances: Lewis v. Bateman, 26 Utah, 434, 73 Pac. 509. As to the right to use a school building for theatrical performances, see Sugar v. Monroe, 108 La. 677, 32 South. 961, 59 L. R. A. 723.

VI. Use of Church for School Purposes.

When it becomes necessary for a board of education to secure a building in which to conduct a public school, they may lease the basement of a church for that purpose: Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669. And while the investment of public funds in school property for the joint purpose of a school site and religious purposes is inhibited, this does not prevent school directors, when necessary from using a building of this character by permission of the trustees, nor from making any suitable arrangement, when necessary for the lease and occupation of the building for the use of the public schools: Swadley v. Haynes (Tenn.), 41 S. W. 1066.

REPUBLIC COUNTY MUTUAL FIRE INSURANCE COMPANY v. JOHNSON.

[69 Kan. 146, 76 Pac. 419.]

INSURANCE—Severability—Vacancy of Premises.—Where a single premium is paid for a policy against fire and wind, the insurance is distributed in specific amounts over a house, hay and grain, and a corn-crib, and there is a condition against the premises becoming vacant, there can be no recovery on the policy for a destruction of the corn-crib by a windstorm after the tenant of the land who occupied the house has moved away. (pp. 158, 163.)

INSURANCE—Severability.—Although a policy placing separate valuations upon separate subjects of insurance is ordinarily severable, it is not so unless the risk intended to be excluded by a violated condition does not affect the item of property for the destruction of which a recovery is sought. (p. 163.)

J. F. Close, for the plaintiff in error.

W. T. Dillon, for the defendant in error.

[146] BURCH, J. A policy of insurance against loss by fire, lightning, tornado and windstorm covered a dwelling-house, a double corn-crib with a stable addition, [147] and hay and grain, all situated on the east half of the northwest quarter of section 22, township 2 south, range 4 west of the sixth principal meridian, in Republic county. A single premium was paid for the entire policy, but the insurance was distributed upon separate items of property as follows: House, one hundred and twenty-five dollars; hay and grain, eighty dollars; double corn-crib, ninety-five dollars. The policy contained a provision that it should become void "if the above-mentioned premises . . . . become vacant for thirty days."

The corn-crib stood some two hundred or three hundred feet from the house. About the site of the buildings were a few fruit trees and a small orchard, and all together they fixed the dwelling place of occupants of the farm. There were no other buildings on the land. At the date of the policy the house was occupied as a dwelling by a tenant of the land. Subsequently the tenant moved away and the owner of the land farmed it from his own residence on an adjoining tract. During the period the double corn-crib was used for the purpose of housing unused farming implements, including a self-binder, two listers, a riding-plow and a stalk-cutter. More than thirty days after the removal of the tenant a windstorm destroyed the double corn-crib. In an action upon the policy against the company issuing it, the assured recovered a judgment for the value of the double corn-crib, and the question now to be determined is, Were the premises vacant, within the meaning of the contract of insurance?

To sustain the judgment rendered, the doctrine of the divisibility of insurance contracts must be given an application so strained and so extreme that the agreement of the parties must be entirely ignored. The argument in brief is that the relations between the insurer and the assured were the same as if [148] separate policies had been issued, one covering the house, another covering the crib, and the third the hay and grain; that hay and grain could not become vacant at all; that human beings were not expected to occupy the double crib with its stable addition, which was properly usable for the storing of machinery, and that the vacancy of the house had no bearing whatever upon any other subject of insurance.

In adopting the theory of the divisibility of insurance contracts which place separate valuations upon separate subjects of

insurance (German Ins. Co. v. York, 48 Kan. 488, 492, 30 Am. St. Rep. 313, 29 Pac. 586, 588), this court quoted extensively from the opinion of Mr. Justice Folger in the case of Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184. A portion of that opinion bears directly upon the proposition under discussion, and is as follows: "Where a separate valuation has been placed upon different subjects of insurance, as eight hundred dollars on a dwelling-house and two hundred dollars on household furniture, the contract is severable and not indivisible. . . . . Again, the principle in the case of a contract about several things, but with a single consideration in gross is this: that we are not able to say that the party would have agreed for one, or for more than one, yet less than all of them, without he could at the same time acquire a right to have them all. But our daily experience and observation show that an insurance company is as ready to insure buildings without insuring the contents, and the contents without insuring the buildings, as to insure them together; so that the principle does not press so hard in considering such a contract as that before us."

In the policy under consideration there is nothing whatever to indicate that the company would have insured the hay and grain at all except as it fell under the protection of a guardian of the premises, or that [149] it would have entertained for a moment an application for the insurance of an isolated, unfrequented corn-crib and stable, the prey of the elements, devoted merely to the shelter of unused implements and machinery and subject to be made the rendezvous of tramps. To assume that it would have done so involves an absolute and perfectly arbitrary repudiation of the conspicuous purpose of the vacancy clause in the contract. Any ordinary individual in charge of premises would exercise a preservative superintendence over them—would take some steps to anchor a ruffed or toppling stack of hay before he would suffer it to scatter before the wind, and would secure loosened boards about the crib, close widening apertures, brace racked timbers, and otherwise fortify the rigidity of the structure against storms.

The courts have given expression to the fundamental conception of the vacancy clause in insurance policies just noted when expressed in different ways and applied to different states of facts.

"From the nature of the contract, whether it be divisible or not, we are constrained to infer that the existence of the condition had a potent influence in securing the assumption of the

entire risk, for it is a matter of common knowledge that a farm with its dwelling and outbuildings constitutes a single establishment, generally remote from other habitations, and that the protection of the whole must, in a great measure, depend upon the occupants of the dwelling. Almost without exception, the outbuildings of a farm are clustered about a place of abode, and for that reason are deemed to be more secure than the occasional outlying barn or crib, which, because of its isolation, becomes the bane of its apprehensive owner. It seems to be impossible not to assume, in this case, that the proximity of the outbuildings to the dwelling influenced the insurer to enter into its contract [150] or contracts under the protection of the condition here questioned. It is natural and reasonable that it should be held to have intended that the continuance of the insurance upon all the subjects thereof was to depend upon the occupation of the dwelling": Hartshorne v. Agricultural Ins. Co., 50 N. J. L. 427, 431, 14 Atl. 615, 618.

"A dwelling-house and barn are unoccupied, within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy, where the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools. . . . . Occupancy as applied to such buildings implied an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage": Ashworth v. Builders' Ins. Co., 112 Mass. 422, 424, 17 Am. Rep. 117.

The principle is the same whether the danger be from fire or from wind.

"The condition cannot be disregarded when the contract is attempted to be enforced. The parties contracted that the building should not be permitted to be vacant or unoccupied. We cannot vary or depart from their contract. It may be, but the point we do not determine, that if the condition required the performance of acts which in no way affected the hazard, or the nonperformance of which could work defendant no prejudice, the courts would not regard it. But it cannot be justly claimed that the hazard of 'high winds, cyclones or tornadoes' was not increased by the vacancy of the building. The occupants of a dwelling, for their own safety and the protection of the property they may have in it, will exercise care for the pres-

ervation of a building, by keeping closed and secured the windows and doors of the house during high winds, which would, to some [151] extent, secure to it increased stability and capacity of resistance to storms": Sexton v. Hawkeye Ins. Co., 69 Iowa, 99, 28 N. W. 462.

In the same clause with the vacancy stipulation of the policy under consideration occurs a provision forbidding that "the risk be increased . . . . by any other means whatever." A like contract was interpreted in Moore v. Phoenix Ins. Co., 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27, as follows: "The meaning of the words 'vacant and unoccupied,' as used in the contract of insurance, is that which the parties intended to give them; and that intention is to be found from the whole instrument, the subject matter of the contract, and the situation of the property insured. The object of the stipulation against vacancy and nonoccupancy was to guard against the increased risk which arises from the absence of everybody whose duty or interest might afford some protection. In the same clause of the contract, 'increase of risk' from the mode of occupation and use of the premises, and 'increase of risk by any means whatever,' are mentioned as express grounds for avoiding the policy. 'If the buildings shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever,' is a statement in which the leading idea in the condition of forfeiture is 'increase of risk,' and that idea must have been intended as part of the definition of the words 'vacant and unoccupied.' It was the increase of risk from the loss of care and attention of persons otherwise present which the parties intended to guard against by the stipulation of forfeiture in case of vacancy and nonoccupancy for more than ten days. They intended by the words 'vacant and unoccupied,' as used in the policy and in the connection in which they were used, such a desertion of the premises and removal from them as would materially increase the risk."

From this it must be apparent that the risk intended [152] to be mitigated by the vacancy clause of the contract affected the double corn-crib with its stable addition as well as the dwelling-house itself. The case therefore presents many features analogous to those discussed in Dohlantry v. Blue Mounds Fire etc. Ins. Co., 83 Wis. 181, 53 N. W. 448, the syllabus of which reads: "The insurance was distributed between the house and other buildings on the farm and their contents. Held, that as

the continued absence of any occupant of the house might reasonably be presumed to increase the risk of loss of the other buildings, the policy was indivisible, and the company could not assert a forfeiture as to the house and its contents, and enforce it as a valid policy as to the other property, without the consent of the assured."

In the opinion of the court it was said: "It requires no argument to show that in this case the continued absence of any occupant of the dwelling-house may reasonably be presumed to increase the risk of loss of the barns and granary, and the contents thereof, situated on the same farm, and presumably subject to the care and watchfulness of an occupant of the dwelling-house, which the contract calls for."

The subject of the divisibility of policies was given careful consideration by the supreme court of Wisconsin in the case of Loomis v. Rockford Ins. Co., 77 Wis. 87, 20 Am. St. Rep. 96, 45 N. W. 813, 8 L. R. A. 834. In that case the rules relating to the subject formulated by the supreme court of Vermont in the case of McGowan v. People's Ins. Co., 54 Vt. 211, 41 Am. Rep. 843, were adopted. In doing so the Wisconsin court said: "These rules are so reasonable and satisfactory that we feel justified in quoting somewhat at length from the opinion. The court says: 'This is a question of [153] great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but, we think, are easily reconciled by referring to the plain principles which should govern them. The general rule, "void in part, void in toto," should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act condemned by public policy or the common law; cases where the contract is entire and not divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items of the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible, the different properties insured for separate sums, and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part.' "

In the case of Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa, 625, 93 Am. St. Rep. 261, 88 N. W. 807, 57 L. R. A. 328, decided in 1902, the supreme court of Iowa took a position much

advanced beyond its earlier decisions, and after a careful review of its previous utterances and of the opinions of many other courts, it states the following conclusion: "We therefore hold on this question, as involved in the case before us, that entirety of premium does not necessarily prove that the contract is indivisible, and that where it appears from the terms of the policy that distinct items or classes of property were separately insured the policy may be valid as to one item or class, although it is invalid as to another item or class by reason of breach of conditions of the policy with reference thereto, provided it appears, also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case a chattel mortgage [154] on the cows and horses could not in any way affect the nature of the risk as to the dwelling-house and contents, and, therefore, we find that a breach of a condition in the policy as to the one class of property did not invalidate the insurance as to the other."

The decisions of German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586, Continental Ins. Co. v. Ward, 50 Kan. 346, 31 Pac. 1079, and Kansas etc. Ins. Co. v. Saindon, 53 Kan. 623, 36 Pac. 983, are virtually to the same effect, except that, as no occasion for so doing had presented itself, the qualification of the rule expressed in the Iowa, Wisconsin and Vermont cases was not noted; therefore, although a policy of insurance so written as to place separate valuations upon separate subjects of insurance will ordinarily be severable, it will not be so unless it can be said that the risk intended to be excluded by a violated condition of the policy did not affect the item of property for the destruction of which a recovery is sought. Although courts are diligent to prevent forfeitures, they may not entirely subvert the contracts of parties deliberately made, in an effort to do so.

The judgment of the trial court is reversed and the cause remanded.

All the justices concurring.

Where Property Insured is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy is usually regarded as entire and indivisible; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy is usually regarded as severable and divisible: Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12

Am. St. Rep. 393; Lomis v. Rockford Ins. Co., 77 Wis. 87, 20 Am. St. Rep. 96; Manchester etc. Assur. Co. v. Glenn, 13 Ind. App. 365, 55 Am. St. Rep. 225. That entirety of premium does not necessarily prove that a policy is indivisible, see Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa, 625, 93 Am. St. Rep. 261.

KEENE SYNDICATE v. WICHITA GAS, ELECTRIC LIGHT AND POWER COMPANY.

[69 Kan. 284, 76 Pac. 834.]

CONTRACT in Restraint of Trade—Lease of Electric Plant.—Where a corporation engaged in generating and furnishing electricity for public and private use leases its machinery and appliances for ten years to a rival corporation in the city, agreeing not to furnish light and power to public or private consumers in the city for that time, and not to dispose of any of its machinery or appliances retained by it for the purpose of generating light and power, the lease is in contravention of public policy, and no action can be maintained thereon for rent by the lessor or his assignee. (p. 168.)

Kos Harris, J. V. Daugherty and Thomas B. Wall, for the plaintiff in error.

Houston & Brooks, for the defendant in error.

285 ATKINSON, J. On the fourteenth day of May, 1897, the Wichita Electric Railway and Light Company, a corporation under the laws of Kansas, with its place of business at the city of Wichita, entered into a contract, or lease, in writing, with the Wichita Gas, Electric Light and Power Company, a corporation under the laws of Kansas, with its place of business at the city of Wichita. By its terms the former leased to the latter, for a period of ten years, at an annual rental of three thousand dollars, payable semi-annually, certain machinery and appliances in the city of Wichita, adapted to, and used by the lessor for, the purpose of generating electricity for light, heat, and power. On the twentieth day of March, 1900, the Keene Syndicate, a corporation, purchased of the lessor, the Wichita Electric Railway and Light Company, the property covered by the lease, and also its interest in the lease, taking a written assignment thereof. The lessee, the Wichita Gas, Electric Light and Power Company, being in default for three years' rent, in August, 1900, the Keene Syndicate, as assignee of the Wichita Electric 286 Railway and Light Company, commenced its action in the district court of Sedgwick county to recover

the rent—the amount claimed due it from the lessee. The petition of plaintiff presented seven causes of action, and attached thereto was a copy of the written lease. The first six causes of action were each a specific claim for recovery upon one of the semi-annual payments of rent. Each cause of action made reference to said lease and made it a part thereof. The seventh and last cause of action in the petition was intended by plaintiff to state a cause of action upon a quantum meruit, for the use of the machinery delivered to defendant under the lease, and by defendant received and used. This last or seventh cause of action made reference to the preceding counts, adopted portions of each, and made them a part thereof, which adoption had the effect to include also in the seventh cause of action the lease attached to, and made a part of, the petition. It became thereby also an action for recovery on the lease, and not a cause of action for recovery on a quantum meruit, as was contemplated by plaintiff. Defendant filed a demurrer to the petition, which was sustained by the court. Plaintiff elected to stand upon its petition, and judgment was entered against it for costs. Plaintiff brings error.

Does the petition on its face disclose a cause of action—a right of plaintiff to recover from defendant? It is charged by defendant that the petition discloses the lease sued on to be against public policy and void. The district court found it to be void for that reason. It is the only question before us for determination.

The petition of plaintiff, by its averments, in addition to embodying the facts above stated with reference to location, corporate existence, the execution of [287] the lease, the leasing of the machinery for the term and consideration mentioned, and the assigning of the lease by the lessor to plaintiff, may fairly be said also to disclose that the lessor and the lessee, at the time the lease was entered into, were rival public utility corporations in the city of Wichita, engaged in generating and furnishing electricity for public and private use for light, heat and power. The petition also in substance avers that the assignor of plaintiff, the Wichita Electric Railway and Light Company, had delivered to defendant all the property described in the lease and had duly performed all the conditions, agreements and stipulations in said lease to be by it performed. The lease contains the following language: "The said first party hereby binds and obligates itself not to engage in the business of furnishing electric light and power to private or public con-

sumers within the city of Wichita during the period covered by this agreement, except for the purpose of operating the street railway now owned by the first party, and said first party furthermore agrees not to dispose of any of the apparatus, machinery, appliances, etc., retained by it, for producing or generating electric light and power in said city of Wichita."

The above language quoted from the lease, applied to, and construed with, the averments of the petition, of which the lease formed a part, fairly discloses that the lessor obligated itself not to engage in the business of furnishing electric light and power to private and public consumers within the city of Wichita during the period of ten years covered thereby; and further agreed that during said period of ten years it would not dispose of any of its machinery or appliances, retained by it, for the purpose of being used to generate electric light and power in the city of Wichita. [288] The effect of this, if carried out, would be that the lessor for said period of ten years would abandon the exercise of its corporate power to generate and furnish electric light and power for public and private use in the city of Wichita; that it would withdraw itself from the field of competition with the lessor, its former competitor in the business, for said period of ten years, and refrain from the sale of property to others who might thereby become competitors of the lessor in the said field of competition during said period of ten years. But it is not necessary for the determination of this case to inquire whether the effect of the agreement between the lessor and the lessee was in fact detrimental to the city of Wichita, or its citizens. The inquiry should be whether the agreement, which, in its necessary or contemplated operation upon the actions of the party to it, tends to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, is against the principles of sound public policy, and consequently void: Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678.

In Western Woodenware Assn. v. Starkey, 84 Mich. 76, 22 Am. St. Rep. 686, 47 N. W. 604, 11 L. R. A. 503, an action to enjoin the association from engaging in a certain business and from using certain premises in carrying on said business in violation of a contract with plaintiff, which contract provided that the association would not engage in, or carry on, the business in controversy for a period of five years, and would not within said period use the said premises or sell them or permit them to be sold or used without the consent of plaintiff,

the court denied the injunction and held the contract void as against public policy. Referring more particularly to that feature of the [289] case wherein the association had contracted not to use, or permit the premises to be used, or to sell the premises for use, in competition with plaintiff, an element in that case not unlike one of the elements in the case at bar, Mr. Justice Long, speaking for the court, said: "In the present case, the defendants were not only to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts, and held void, as unreasonable restraints of trade, and therefore void on the ground of public policy."

Among the contracts declared illegal under the common law because opposed to public policy were contracts in general restraint of trade—contracts between individuals to prevent competition and keep up the prices of articles of utility. It is well settled in the law of contracts that the first purpose of the court is to look to the welfare of the public, and if the enforcement of the agreement would be detrimental to its interests no relief should be granted to the party injured, and that, even though it might result beneficially to one of the parties who made and violated the agreement. In Gibbs v. Baltimore Gas Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553, 32 L. ed. 979, the court said: "Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public interest." The rule that contracts and agreements, when contrary to public policy, will not be enforced is one of the great preservatives [290] of a state. It has been the uniform rule of this court, and indeed of all courts, to hold that contracts tainted with illegality are absolutely void: Hawley v. Kansas etc. Coal Co., 48 Kan. 593, 30 Pac. 14; Hinnen v. Newman, 35 Kan. 709, 12 Pac. 144. Plaintiff, the assignee of the lessor, the Wichita Electric Railway and Light Company, is in no better position to recover than the lessor, as the illegal consideration appears upon the face of the contract or lease: Saratoga County Bank v. King, 44 N. Y. 87; Setter v. Alvey, 15 Kan. 157.

Whether plaintiff could maintain an action against defend-

ant on a quantum meruit or otherwise, independently of the contract, need not be here considered. That question, in the view we have taken of the seventh cause of action of the petition, is not in the record before us.

The lease sued upon being in contravention of public policy, no action for a recovery upon it can be maintained. The judgment of the district court will be affirmed.

All the justices concurring.

A Contract in the form of a lease whereby one manufacturer agrees with another engaged in the same business not to manufacture certain articles during a specified time, is void as against public policy: Clark v. Needham, 125 Mich. 84, 84 Am. St. Rep. 559. See, further, Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 85 Am. St. Rep. 125; monographic note to Harding v. American Glucose Co., 74 Am. St. Rep. 248.

FAIR v. CITIZENS' STATE BANK.

[69 Kan. 353, 76 Pac. 847.]

REPLEVIN—Deterioration of Property.—A judgment in replevin for the value of a note or its return is not complied with by returning the note if the statute of limitations has run against it during its retention. The defendant is liable for the depreciation in value caused by his retention of the paper. (p. 170.)

Prigg & Williams, for the plaintiff in error.

H. Whiteside, for the defendant in error.

353 ATKINSON, J. On February 20, 1895, the firm of D. J. Fair & Co., a partnership composed of D. J. Fair and George M. Schurr, was dissolved by mutual consent, Schurr retiring therefrom. The firm had for several years engaged in the lumber and grain business at Abbyville, Kansas, during which time Schurr had the active management of the business. Among other transactions in the interest of the firm, Schurr gave to the Citizens' State Bank of Arlington, a note for six hundred and forty-seven dollars, signed by himself only and having the appearance of being his individual liability. To secure the payment of this note he placed with the bank, as collateral security, a number of notes, belonging to the firm, indorsing thereon the firm name. After the dissolution of the firm Fair demanded the notes held by 354 the bank. It was claimed by him that the note to the bank for six hundred and forty-seven

dollars was the individual obligation of Schurr, and that Schurr, without his knowledge and without authority, had turned over to the bank the notes by it held as collateral. The bank refused to deliver these notes to Fair and he commenced two actions in replevin to secure their possession, and one action in conversion. These three actions were consolidated and tried as one. The bank recovered a judgment against Fair for the value of the collateral notes or their return. Fair filed a supersedeas bond, retained possession of the notes given to the bank as collateral security, and carried the case to the court of appeals, where it was affirmed: Fair v. Citizens' State Bank, 9 Kan. App. 779, 59 Pac. 43.

Among the collateral notes which came into the possession of Fair by the replevin proceedings was one for one hundred and twenty-seven dollars and twenty cents, given by J. A. Kitzmiller and A. W. Marteney to D. J. Fair & Co., which, for convenience, we will hereafter refer to as the Kitzmiller note. Soon after the filing of the mandate of the court of appeals with the clerk of the district court, the bank caused an execution to issue on its judgment against Fair. Thereupon Fair, as a compliance with the alternative judgment of the bank against him, delivered the Kitzmiller note to the clerk of the district court, from whom the bank received it. The execution was returned unexecuted. This note was due December 1, 1894, and no payments had been made thereon. The mandate was issued from the court of appeals December 23, 1899. This action was commenced by the bank against D. J. Fair on the fourth day of September, 1901, in the district court of Reno county, to recover the value of the Kitzmiller note and interest. There was due plaintiff on the original note a sum in excess 355 of the amount sued for. In its petition the bank averred substantially the facts above set forth, and charged liability of defendant thereon. Defendant denied liability, pleaded the statute of limitations as a bar to a recovery, and alleged that the original note had been paid. The trial court rendered judgment for plaintiff for one hundred and eighty-four dollars and thirty cents, and defendant brings error.

There was no error in overruling defendant's demurrer to the petition or in refusing to sustain an objection to the introduction of evidence; nor did the court commit error in overruling defendant's demurrer to plaintiff's evidence. The judgment in the replevin action against defendant Fair was an alternative one; it found the value of the collateral notes and directed a

return of them or their value, providing also for the payment of any sums collected on them. It is disclosed by the record that collections were made by defendant on these notes and paid in to the clerk of the court; none, however, upon the Kitzmiller note. When defendant delivered the note to the clerk of the court, with the view of thereby complying with the judgment entered against him in the replevin action, the statute of limitations had run against it, and it was at that time barred against the makers and indorsers (Gen. Stats. 1901, sec. 4446); no action could have been maintained by plaintiff against them or any of them, and the note was prima facie without value. It was not claimed by defendant that at the time the note was delivered by him to the clerk of the court it possessed value, nor was there testimony offered by defendant to show any value in the note at that time. Testimony was offered by plaintiff tending to show that it was without value, and the trial court by its judgment found it to be without value.

The action against defendant having been brought [356] not upon the note but to recover its value, he could not interpose as a defense to plaintiff's right to a recovery that the note was then barred against him by the statute of limitations; his direct liability on the note was not the subject of controversy in this action. Whether he was liable for the deterioration in value of the note caused by his retention of it was the question before the trial court, and is the question we are here called upon to determine. It is an established and well-recognized rule of law that where property has been taken in replevin, to comply with the alternative judgment for its return it must be returned in substantially the same condition as when taken, and without deterioration in value: Washington Ice Co. v. Webster, 125 U. S. 426, 8 Sup. Ct. Rep. 947, 31 L. ed. 799; George v. Hewlett, 70 Miss. 1, 35 Am. St. Rep. 626, 12 South. 855; McPherson v. Acme Lumber Co., 70 Miss. 649, 12 South. 857; Hazlett v. Witherspoon (Miss.), 25 South. 150; Hinkson v. Morrison, 47 Iowa, 167; Yelton v. Slinkard, 85 Ind. 190; 24 Am. & Eng. Ency. of Law, 2d ed., 538.

Defendant could not, by the return of a worthless note, made so by deterioration in value caused by his retention of it, claim a compliance with the judgment rendered against him in the replevin action and thereby escape liability. He retained the property at his own risk as to deterioration in value and not at the risk of plantiff. He did not collect the note, and by retaining it prevented plaintiff from doing so. The statute contem-

plates that the property be returned in substantially the same condition, and of the same value, as when taken.

The judgment of the court below is affirmed.

All the justices concurring.

An Ordinary Alternative Replevin Judgment may be satisfied before levy by returning the property within a reasonable time: Marks v. Willis, 36 Or. 1, 78 Am. St. Rep. 752. But where the defendant in replevin obtained possession by executing a forthcoming bond, the subsequent destruction of the property without his fault does not relieve him from liability: George v. Hewlett, 70 Miss. 1, 35 Am. St. Rep. 626.

STATE v. STEPHENSON.

[69 Kan. 405, 76 Pac. 905.]

EVIDENCE—Books of Account—Form of Keeping.—A book of accounts to be admissible in evidence, need not be kept in any particular form; it is enough that it is regularly and correctly kept, containing the original entries of the daily transactions of the business, made at or about the time the transactions were had. (p. 173.)

EVIDENCE—Books of Account.—The Name Given a book of accounts is not material in determining its admissibility in evidence; the fact that it is called a ledger does not change the character of the entries. (p. 173.)

EVIDENCE—Books of Account—Person Making Entries.—It is not necessary, to make books of account admissible in evidence, that the bookkeeper should have made the sales or billed out the goods sold. (p. 173.)

EVIDENCE—Books of Account—Report of Sales.—If sales are regularly reported to the bookkeeper, and from such reports, or from orders or other temporary memoranda of the salesmen, the entries are promptly and faithfully made by him, the book may be received in evidence when duly verified by him. (p. 173.)

CONSTITUTIONAL LAW—Indeterminate Sentence.—The statute of Kansas providing for the imposition of indeterminate sentences and the parole and release of prisoners is not unconstitutional as encroaching upon the judicial and executive powers of the courts and the governor. (p. 173.)

CRIMINAL LAW—Effect of Arrest of Judgment.—The allowance of a motion in arrest of judgment does not operate as an acquittal, but only places the defendant in the same situation in which he was before the prosecution was begun. (p. 174.)

David Richtie and R. D. Armstrong, for the appellant.

C. C. Coleman, attorney general, C. W. Burch, county attorney, and T. L. Bond, for the appellee.

[406] JOHNSTON, C. J. In an information containing six counts J. G. Stephenson was charged with obtaining goods from the H. D. Lee Mercantile Company by means of false pretenses. On the trial he was found guilty of five of the charges, but a motion in arrest of judgment was sustained as to the finding on four of the counts. Upon the remaining count judgment was rendered, sentencing him to imprisonment at hard labor in the state penitentiary, without fixing the limit or duration of the same. Complaint is made here of the character of the proof offered by the state.

It was charged that, to obtain the goods and the credit, appellant made false representations of the [407] amount of his indebtedness. To sustain this averment, and to show that he owed a much larger sum than he represented, the account-books of several of the wholesale houses from which he had obtained credits were received in evidence, first having been authenticated by the oaths of the bookkeepers who made the entries. The verified accounts received were entered on what are called "ledgers," and the contention is that these were not books of original entries.

The evidence discloses that modern wholesale houses have adopted modern methods of bookkeeping, in which the day-book and journal once in common use have no place in the system. The order from a customer comes in, and when approved by a credit man is passed to shipping and bill clerks, who select and assemble the goods ordered from different departments of the house and check them out, and then the order, initialed or marked by those through whose hands it has passed, is handed to the bookkeeper, who formally enters the items in a book designated a "ledger." This book is the first complete and permanent record of the charges and credits in the dealings had between the house and the customer. It appears that in some instances, for safety and convenience, an impression of the order is taken in a book, but it is only a copy of the order itself and cannot be regarded as a book of original entries. All that precedes the entries in the so-called "ledger" are mere temporary memoranda which are turned in to the bookkeeper, who makes the first and only formal entries of the transactions between the parties. They are made about the times of the transactions and in the regular course of business. This book is the only permanent record of the dealings of the parties from which the status of a customer's account can be ascertained.

[408] The purpose of the inquiry at the trial was to learn the extent of appellant's indebtedness, and that could not be learned

from the orders, but would be shown by the book of accounts wherein was entered, contemporaneously with each transaction, both charges and credits. It is not necessary to admissibility in evidence that a book of accounts be kept in any particular form, nor is it material by what name it may be called; it is enough, if it be a book regularly and correctly kept, containing original entries of the daily transactions of the business, made at or about the times the transactions were had. The fact that the book is called a "ledger" does not change the character of the entries, nor is it necessary that the bookkeeper should have made the sales or billed out the goods sold to make the book of accounts admissible in evidence. If the sales made be regularly reported to the bookkeeper, and from such reports, or from orders or other temporary memoranda of the salesmen, the entries be promptly and faithfully made by the bookkeeper, the book is entitled to be read in evidence, when duly verified by the one who kept it: Gen. Stats. 1901, sec. 4835; Rice & Floyd v. Hodge Bros., 26 Kan. 164; State v. McCormick, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

In some cases the leaves of the ledger containing the accounts were produced by the bookkeeper, who swore that they were properly and correctly kept. In other cases the witnesses from personal knowledge gave the state of the accounts, and in addition there were admissions of the appellant which supported the testimony of the books and bookkeepers, and also proof of statements by him that he misrepresented his indebtedness, making it from five hundred dollars to seven hundred dollars less than it actually was. The evidence was competent and abundant to sustain the charge.

400 The appellant next attacks the judgment of the court. Under chapter 375 of the Laws of 1903 an indeterminate sentence was imposed. The contention is that the provisions for the parole and release of prisoners encroaches upon the judicial and executive powers vested by the constitution in the courts and in the governor. Substantially the same objections were made to the statute authorizing an indeterminate sentence where youthful offenders are convicted and sent to the state reformatory, and it was held that the power conferred on the board of managers to parole and release the prisoners did not infringe on the judicial power of the courts or the pardoning power of the governor: State v. Page, 60 Kan. 664, 57 Pac. 514. That decision is a sufficient answer to the objections made to the statute under consideration.

It is next contended that the action of the court in arresting the judgment as to four of the counts operated as an acquittal of the defendant on all of the charges, including the one upon which the judgment was founded. This contention is based on the theory that all of the goods were obtained on the same false pretense, and therefore constitute but a single offense. The motion in arrest of judgment only raised the questions of the jurisdiction of the court, or the sufficiency of the facts to constitute a public offense, and the allowance of the motion did not operate as an acquittal, but only placed the defendant in the same situation in which he was before the prosecution was begun: Crim. Code, secs. 277, 279; Gen. Stats. 1901, secs. 5715, 5717. The count upon which the judgment was based sets up a complete transaction and charges a distinct offense, and whether the court ruled correctly or incorrectly on the motion in arrest of judgment, the verdict of the jury finding the defendant guilty under the first count is not affected by such ruling.

410 The counsel for appellant reargues the question determined in the proceeding in habeas corpus brought by the appellant soon after the conviction was had. We see no reason to reopen the consideration of that question, or to change the conclusion reached in the earlier proceeding: In re Stephenson, 67 Kan. 556, 73 Pac. 62.

There is nothing substantial in the objections made to the refusal of the court to strike certain averments from the information. Even if they were to be regarded as surplusage, their retention did not operate to the prejudice of the appellant.

We find no error in the record, and therefore the judgment of the district court will be affirmed.

All the justices concurring.

Books of Account as Evidence are discussed in the monographic note to Union Bank v. Knapp, 15 Am. Dec. 191-198. The manner of keeping accounts and their purpose, rather than the form of the books themselves, is the important consideration in determining whether they may be received as independent evidence: Post v. Kenerson, 72 Vt. 341, 82 Am. St. Rep. 948. See, too, Harmon v. Decker, 41 Or. 587, 93 Am. St. Rep. 748.

A Statute Providing for Indeterminate Sentences is upheld in People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. SPAULDING.

[69 Kan. 431, 77 Pac. 106.]

INJUNCTION Against Trespass on Railroad Track.—An injunction will issue against one who makes a practice of riding a bicycle on a railway track, and thereby menaces the safety of public travel. (p. 177.)

Fred Robertson and Tully Scott, for the plaintiff in error.

John E. Hessin, for the defendant in error.

431 GREENE, J. The plaintiff is a corporation owning and operating a line of railroad from the city of Atchison to the city of Cummings, in Atchison county, over which it transports passengers and freight. It brought this suit perpetually to enjoin the defendant from riding over its track from Atchison to Cummings on a bicycle so constructed as to enable him to run it on the rails. A temporary injunction was granted. To the petition the defendant filed a demurrer which was overruled. In his answer he pleaded a general denial and that the petition did not state facts sufficient to entitle the plaintiff to the relief sought. The trial resulted in a judgment for defendant, and the plaintiff prosecutes this proceeding in error.

The defendant in error moves to dismiss the action for want of jurisdiction of this court. It is true that neither the petition in the court below nor the evidence upon the trial stated or proved what amount 432 was in controversy, but after the case was tried the plaintiff in error procured and filed with the case-made affidavits which showed that the amount exceeded one hundred dollars. It has been the common practice of this court since the decision of the case of Jones v. Kellogg, 51 Kan. 263, 37 Am. St. Rep. 278, 33 Pac. 997, to show any jurisdictional fact by evidence outside the record. The motion is overruled.

It appears that upon the final hearing the court concluded that the plaintiff's petition was not sufficient to entitle it to any relief. The material part of the petition reads as follows: "That it is now, and for a number of years last past has been. the owner of a line of railroad running through the county of Atchison and into and through the city of Atchison, in said county, over which line of road it operates continuously freight and passenger trains, both day and night, and that it is neces-

sary for the protection of its trains, passengers and employés, that it have the exclusive use of its tracks, roadbed and right of way; that the said defendant has for a considerable length of time, without any authority of law and without the assent or permission of this plaintiff, used its track and roadbed between the station of Cummings and the city of Atchison, in said Atchison county, Kansas, for the purpose of transporting himself thereover on a vehicle called a bicycle, so constructed as to run along and upon the tracks of said plaintiff, and propelled by himself; that this plaintiff has repeatedly warned and notified said defendant that he must not use its said railroad track and roadbed in the manner and for the purposes stated, but that he refuses to desist from the use of its said track in the manner aforesaid, and informs the plaintiff that he will not obey the notice and warning given him as aforesaid; the plaintiff avers that the use of its said railroad track and roadbed by the defendant in the manner aforesaid does, and will, greatly endanger the operation of its trains thereover, and is [433] liable to cause collision between the defendant and his bicycle and the plaintiff's trains, and by reason of collisions which are likely and probable to occur its property and the lives of the plaintiff's passengers and employés are constantly menaced and endangered, and that if said defendant be permitted to continue the use of the said track and railroad of the plaintiff in the manner hereinbefore stated, said plaintiff will suffer irreparable damage and injury by reason of collision between the defendant and his bicycle and plaintiff's trains, and that it is without a plain and adequate remedy at law."

The objections urged to this petition, as stated by defendant in his brief, are the following: "The length of the track so used by defendant is not stated, nor its condition; there is no statement of the number of trains passing over that portion of the track each day, nor the respective times of their passage, nor that defendant's use of the track with his bicycle was at such times that trains were due or likely to pass over it; nor how, nor in what way, a collision with a man on a bicycle could or would derail a train, or interrupt its passage over the track. Nor are any facts stated to show how, or in what manner, a collision might occur, or how such collision could or would occasion any interference with the operation of trains, or endanger plaintiff's property and the lives of its passengers and employés."

These objections cannot be sustained. If the plaintiff can

maintain the action at all its petition states sufficient facts to entitle it to a perpetual injunction. It is pertinent to say that the right of a railroad company to the exclusive use of its tracks does not depend wholly upon the actual damage done, or likely to be done, to its tracks or right of way, or the financial ability of the person committing such damage to respond in damages. A railroad company is a quasi public corporation: St. Joseph etc. R. R. Co. v. [434] Ryan, 11 Kan. 602, 15 Am. Rep. 357; State v. Dodge City etc. Ry. Co., 53 Kan. 377, 42 Am. St. Rep. 295, 36 Pac. 747. Plaintiff's duties with reference to carrying freight and passengers are subjects of legislative regulation and control. It is properly held to the highest degree of care for the safety of the lives and property thus intrusted to it commensurate with the business in which it is engaged. The damage to plaintiff's track by reason of defendant's constant use thereof, or the danger to his life by his foolhardy persistence in riding thereon, are not the most important questions, nor are they determinative of plaintiff's right to an injunction. If these were all the questions, the plaintiff might be required to seek other relief. The rights of the public are involved. The safety of public travel demands a clear track, and it is the duty of railroad companies to provide it. If it be unable to keep therefrom trespassers, who, by their constant presence, are liable to endanger the lives of the public who constantly use these thoroughfares, it may apply to the equitable power of the court for assistance.

It has been ruled again and again by this court that a railroad company is entitled to the uninterrupted and exclusive possession and occupancy of its tracks and all of its right of way necessary for conducting its business, except where built on the public highway or over public crossings: Missouri Pac. Ry. Co. v. Manson, 31 Kan. 337, 2 Pac. 800; Kansas City Ry. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190; Tennis v. Rapid Transit Ry. Co., 45 Kan. 503, 25 Pac. 876; Kansas City R. R. Co. v. Commissioners of Jackson Co., 45 Kan. 716, 26 Pac. 394; Dillon v. Kansas City etc. R. R. Co., 67 Kan. 687, 74 Pac. 251. The petition in this case shows that the defendant was a constant trespasser upon the company's tracks, and his conduct a menace to the [435] safe and speedy operation of its trains and dangerous to public travel.

The judgment of the court below is reversed and the cause remanded.

All the justices concurring.

Railroad Companies have a right to a clear track in the prosecution of their business. Persons using a railroad track as a highway are, under some circumstances, regarded as trespassers: State v. Baltimore etc. R. R. Co., 69 Md. 494, 9 Am. St. Rep. 436. See, too, Schexnadrye v. Texas etc. Ry. Co., 46 La. Ann. 248, 49 Am. St Rep. 321; Kelly v. Michigan Cent. R. R. Co. 65 Mich. 186, 8 Am. St. Rep. 876; Troy v. Cape Fear etc. R. R. Co. 99 N. C. 298, 6 Am. St. Rep. 521. As to the right to an injunction against trespassers, see the monographic note to Moore v. Halliday, 99 Am. St. Rep. 731-753.

STEWART v. HARRIS.

[69 Kan. 498, 77 Pac. 277.]

CORPORATIONS—Directors' Trusteeship for Stockholders.—The managing officers of a corporation are not only trustees of the corporate entity and property, but they are also, to some extent, and in many respects, trustees for the shareholders. (p. 182.)

SALES Between Persons in a Fiduciary Relation.—To sustain a sale between persons standing in a fiduciary relation to each other, the buyer must show affirmatively that the transaction was conducted in perfect good faith, without pressure or influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller. (p. 183.)

CORPORATIONS—Directors Dealing with Shareholders.—The fact that the directors and managing officers of a corporation are quasi trustees for the stockholders does not prevent them from dealing with the latter; the only restriction is, that in such dealing their conduct be fair, open, and above reproach. (p. 185.)

CORPORATIONS—Directors Purchasing Stock from Shareholders.—Before a director or managing officer of a corporation, having knowledge of the condition of its affairs, can rightfully purchase the stock of one not actively engaged in the management of the concern, he must inform such stockholder of the true condition of corporate affairs. (p. 185.)

Kos Harris and Ed. T. Hackney, for the plaintiff in error.

W. W. Schwinn, C. C. Elliott and James Lawrence, for the defendant in error.

499 ATKINSON, J. On January 5, 1901, A. B. Harris sold to John T. Stewart for two thousand dollars, twelve shares of the capital stock of the Wellington National Bank. Harris subsequently brought this action against Stewart to recover the difference between the amount he received for the stock and its actual value at the time he sold it to Stewart. Judgment was rendered for plaintiff on the verdict and findings of a jury and defendant prosecutes error.

Defendant, at the time he purchased the stock of plaintiff, was president of the bank and the holder of a majority of the stock, and he had been such president continuously since 1893, and actively engaged in the management of its affairs. Plaintiff was a man over eighty years of age, and retired from active business. He had never engaged in the business of banking and had never attended a meeting of the stockholders of this bank. The petition set forth these facts and in substance charged that, through his agent, T. F. Randolph, defendant purchased the stock of plaintiff; that he withheld from plaintiff a knowledge of the affairs of the bank, and by fraud, and by concealing from plaintiff the real condition of the affairs of the bank, obtained the stock at much less than its actual value. A recovery was asked for the difference between the amount received and the actual value of the stock at the time of the sale. Defendant's answer, in substance, denied that he withheld from plaintiff the information requested; that he had procured the shares of stock from plaintiff by fraud or [500] concealment; that Randolph was his agent (under oath); and averred that plaintiff had, or could have obtained upon inquiry, full knowledge of the condition of affairs of the bank at the time he sold the shares of stock.

Defendant was charged with undertaking and carrying out a scheme so to manipulate and manage the condition of affairs of the bank as to enable him to acquire the stock at a price grossly inadequate to its real value. The capital stock of the bank was fifty thousand dollars, represented by five hundred shares of the par value of one hundred dollars each. When defendant took charge of the bank its affairs were in a deplorable condition; the bank had been improvidently managed; the financial condition of the community and the country at large was wretched. Under the change of management many thousand dollars of the notes held by the bank were charged off its books as worthless; much of the real estate owned by the bank was charged off the books. Time brought about a general improvement of financial conditions, and prosperous agricultural seasons in the community.

One by one the old officers and employés [illegible] pped ou[illegible] Defendant was a director and president, a[illegible] suprem[illegible] in the management of aff[illegible] By good [illegible] on t[illegible] part of the new managem[illegible] bank pr[illegible] con[illegible] tions improved there wer[illegible] made o[illegible] e no[illegible] that had been charged o[illegible] as wo[illegible] lan[illegible]

became valuable. The bank in the meantime had become the owner of ninety-eight shares of its capital stock which had been pledged to secure an indebtedness. Its affairs became very prosperous. These conditions were well known to defendant, and were but slightly known to plaintiff. The payments [501] made on notes which had been charged off, instead of being carried in the profit and loss account where the condition of the bank would be more readily shown from an examination of its books, were carried in the cashier's account, and funds carried in the cashier's account did not appear as assets. Lands not charged off the books were carried at a nominal valuation only; the lands charged off the books did not appear as assets. The charged-off property and the funds carried in the cashier's account did not appear in the published reports of the condition of the bank.

A four per cent dividend only had been paid to stockholders from June, 1897, and no dividends were paid to the holders of stock during the two years plaintiff was the owner of the stock sold to defendant. Plaintiff, before selling the stock, went to defendant and inquired about the condition of the bank, and asked if dividends would be paid. Defendant informed him that no dividends would be paid, that the bank was in good condition, but that the policy was to strengthen it. He related to plaintiff the bad condition of affairs at the time he took charge of it, and told him of the large amount of paper then charged off. Defendant gave to plaintiff no further knowledge or information of affairs than to say that the bank was in a good condition. Defendant himself at two different times made a proposition to purchase the stock of plaintiff, on one occasion offering one thousand dollars, and, about two weeks before he purchased the stock through Randolph, he offered fourteen hundred dollars for it. Plaintiff received from defendant, through his agent, Randolph, one hundred and sixty-six dollars per share for his twelve shares of stock. At that time it was worth three hundred and fifty dollars per share. Gradually defendant bought up stock of the bank. Not long after he purchased the stock of plaintiff he acquired [502] the ninety-eight shares of the capital stock held by the bank. This he obtained for a sum much less than its real value. He was then the owner of four hundred and forty-five of the five hundred shares of the capital stock. Within a short time thereafter a dividend of one hundred and twenty per cent was declared. Other dividends soon followed.

Upon the trial, among others, the court gave to the jury the following instruction: "You are instructed that the president, or other managing officer of a corporation doing business as a bank, stands in relation of a trustee to all the stockholders who are not themselves engaged in the active management of the bank; and before any managing officer of a bank who is acquainted with its condition and affairs can rightfully purchase the stock of such bank from stockholders who are not actively engaged in the management and operation of the bank, such managing officers must inform such stockholders of the true condition of the bank and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such managing officer himself possesses; and a purchase from a stockholder who is not acquainted with the condition and affairs of the bank of his stock in such bank by one of the managing officers, without first having informed such stockholder of the true conditions of the bank and of the amount and value of its assets, is a fraud on the part of such managing officer, and renders him liable to pay the stockholder the full value of the stock, without reference to the price agreed on at the time of the sale, provided the stockholder himself does not know the value of the stock."

Of the giving of said instruction plaintiff in error complains and assigns error. Does the instruction given correctly state the relation of the president or other managing officer of a corporation to the stockholders of such corporation not actively engaged in the management of its affairs? Does it correctly [508] declare the lawful duty of such president or other managing officer, relative to his obligation to the stockholders not engaged in the active management of the corporation, before he can rightfully purchase of them their stock?

The exact questions before us have never been determined by this court. Our attention is directed to Mulvane v. O'Brien, 58 Kan. 463, 49 Pac. 607, as a parallel case. Mulvane was a director and the president of the corporation and O'Brien was also a director and the secretary. Defendant himself did not purchase the stock of plaintiff, but sold it to another and accounted to plaintiff for the par value only, and not for the amount he had actually received for it. The action was to recover from defendant the difference between the amount accounted for and the amount defendant actually received for the stock. The case was determined, not on the duties of defendant toward plaintiff because of any fiduciary relation existing

between them as a stockholder and the president and managing officer of a corporation, but because of a contract of agency at the time existing between them, whereby defendant undertook to sell for plaintiff his stock in the corporation. Again, had the right to a recovery been based on a claim of fiduciary relation existing between defendant and plaintiff, the former as the president and managing agent of the corporation and the latter as a stockholder therein, the facts would materially differ from those in the case under review. There defendant and plaintiff were president and secretary respectively, of the corporation, and jointly managed its affairs. Each was actively engaged in the management, and had an equal opportunity to know of its condition and affairs. The same cannot be said of plaintiff and defendant in the case at bar.

504 The managing officers of a corporation are trustees not only in relation to the corporate entity and the corporate property, but they are also, to some extent and in many respects, trustees for the corporate shareholders. That they are trustees for the corporation and the corporate property all the authorities are agreed. It would be difficult to lay down a general rule comprehensive of the extent of, and all the instances in which, their trusteeship exists as to the stockholders of the corporation. Pomeroy, in his work on Equity Jurisprudence, after an analysis of the relations, recognizes and announces the doctrine that in their fiduciary relation the directors and managing officers of a corporation occupy, as to the corporate entity and corporate property, the position of quasi trustees. Of the relation of such officers to the stockholders of the corporation, he says: "On the other hand, the directors and managing officers occupy the position of quasi trustees toward the stockholders alone, and not at all toward the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders; from it arise the fiduciary duties of the directors toward the stockholders in dealings which may affect the stock and the rights of the stockholders therein, and their equitable remedies for a violation of those duties. To sum up, directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust; they are quasi or sub modo trustees for the corporation

with respect to the corporate property, and they are quasi or sub modo trustees for the stockholders with respect to their shares of the stock": 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1090.

505 The supreme court of the United States, in Jackson v. Ludeling, 21 Wall. 616, 22 L. ed. 492, declared: "The managers and officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form."

In Sargent v. Kansas etc. R. R. Co., 48 Kan. 672, 688, 29 Pac. 1063, an action brought by Sargent to recover on an order assigned to him for one thousand shares of the stock of the railroad corporation, the question of the good faith of the transaction was before the court for determination. Chief Justice Horton, in speaking for the court, said: "The relation between the directors of a corporation and its stockholders is that of trustee and cestui que trust. The directors are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust which, if they undertake, it is their duty to perform fully and entirely. No director of a railroad company or any other corporation can use his official position to secure a personal advantage to himself."

The general rule applicable to a purchase and sale between parties who sustain to each other a confidential or fiduciary relation appears to be that, to sustain the sale, the buyer must show affirmatively that the transaction was conducted in perfect good faith, without pressure or influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller. The rule is applied with more or less strictness to all the well-known cases of fiduciary relation, as that of attorney and client, trustee and cestui que trust, principal and agent, and guardian and ward: Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842; 8 Am. & Eng. Ency. of Law, 2d ed., 644.

506 In Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232, the right of plaintiff to a recovery was conceded where defendant, the president and director of a corporation, purchased of plaintiff his holdings of stock in the corporation at one hundred and ten dollars, worth at the time one hundred and eighty-five dollars per share. The action was brought to recover of defendant the difference between the amount by plaintiff received for the stock and the value of the stock at the time of the sale. It

was charged that defendant in the purchase of the stock withheld from plaintiff information known to defendant and unknown to plaintiff relative to its value, which, owing to the fiduciary relation existing between the parties, it was the duty of the defendant to disclose to plaintiff. It is a well-considered case. Many features of it are applicable to the case under review. We quote from the opinion the following: "It is a matter of common knowledge that the market value of shares rises and falls, not only because of an increase or decrease in tangible property, but by reason of real or contemplated action on the part of managing officers; declaring or passing dividends; the making of fortunate or unfortunate contracts; the loss or gain of property in dispute; profitable or disadvantageous sales or leases. And to say that a director who has been placed where he himself may raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof, and buy from or sell to one whom he is directly representing, without making a full disclosure and putting the stockholder on an equality of knowledge as to these facts, would offer a premium for faithless silence, and give a reward for the suppression of truth. It would sanction concealment by one who is bound to speak and permit him to take advantage of his own wrong—a thing abhorrent to a court of conscience. It is conceded that the position which the director occupies prevents [507] him from making personal gains at the expense of the company or of the whole body of stockholders. But a rule that he is not trustee for the individual shareholders leads inevitably to the conclusion that while a director is bound to serve stockholders en masse he may antagonize them one by one; that he is an officer of the company, but may be the foe of each private in the ranks. When it is admitted, as it must be both from the very nature of his duty and from the rulings of nearly all the cases, that he is a trustee for the shareholder, how is it possible, in principle, to draw the line and say that while trustee for some purposes he is not for others immediately connected therewith?"

The case of Board of Commissioners of Tippecanoe Co. v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245, is the leading authority cited and relied on by plaintiff in error in support of the claim that the instruction under consideration does not correctly state the law. It was in that case held that there was no relation of trust between the president and director of a corporation and one of its stockholders; that in the absence of actual

fraud a purchase of stock by the former from the latter was valid, though in his official position the president knew at the time he purchased the stock it was worth more than its nominal market value, but did not disclose to the stockholder the facts within his knowledge as to its real value. The decision was rendered by a divided court in 1873. It is bottomed upon the view announced by the court that, while the officers and managing agents of a corporation are trustees for the corporation and its corporate property, they sustain no trust relation to the stockholders of the corporation, and owe to them none of the duties of a trust relation. The rule laid down has met with much criticism. The position taken leaves the stockholders' interest in the corporation and all matters affecting its value wholly in the charge and keeping [508] of the managing officers of the corporation, and leaves the stockholders their legitimate prey. We cannot give the sanction of our approval to the views there expressed.

The fact that the directors and managing officers of a corporation are quasi trustees for the stockholders does not prohibit them from dealing with the latter. The only restriction is that in such dealing their conduct be fair, open and above reproach. Because of the trust relation and the better opportunities afforded for acquiring information, before any director or managing officer of a corporation, having knowledge of its condition of affairs, can rightfully purchase the stock of one not actively engaged in the management, he must inform such stockholder of the true condition of affairs.

Defendant suggests that plaintiff himself should have exercised more diligence in investigating the affairs of the bank; that the books were open to him. By this we are asked to say that in this case a means of knowledge is equivalent to knowledge; that a clue to the facts which, if diligently followed up, would lead to a disclosure is equivalent to a discovery. Plaintiff could not be required to make an investigation of the books of the bank to determine its financial condition simply because it was in his power to do so. The diligence required by one to protect his interests is only such as a person of ordinary prudence would exercise under like circumstances. In a case like this the trust relation existing between the parties, the superior opportunities of defendant to know of the condition of the affairs of the bank, and his actual knowledge of its affairs, required no such diligence of inquiry on the part of plaintiff as contended for by defendant. Plaintiff had the right to rely

upon [509] the belief that defendant would disclose to him the true condition of the affairs of the bank, and that he would not be called upon to investigate the condition of its affairs before he could with safety sell to defendant his holdings of stock. It is not the intent of the law to place a restraint on the affairs of business when conducted fairly, honestly and openly, nor to deprive one party to a contract of the advantage which superior judgment, greater skill or better information may give, but it cannot give its approval to a course of dealing that will permit those occupying a trust relation to be unmindful of the trust, betraying the confidence reposed, and profit by such betrayal.

The jury, in addition to returning a general verdict for plaintiff, returned numerous special findings. The record discloses that there was some competent testimony to support all the special findings returned, including the one that Randolph was the agent of defendant. The findings are in harmony with and uphold the general verdict.

The brief of plaintiff in error contains sixty-seven assignments of error. Most of them are based on the rulings of the trial court in the admission of testimony. Some are admitted by counsel to be unimportant, or cured or corrected by subsequent proceedings. Many of them are based on the claim that the testimony introduced was not within the issues. In a case of this character, where fraud is charged, great latitude is allowed to the scope of the inquiry, the limit resting largely in the discretion of the trial court. The record discloses no abuse of this discretion. Nor did the court abuse its discretion in limiting the number of witnesses used on impeachment.

The instructions given fairly state the law of the [510] case, and there was no error in refusing the instructions requested and not given.

The judgment will be affirmed.

All the justices concurring.

On the Trusteeship of Directors of a corporation generally, see Bosworth v. Allen, 168 N. Y. 157, 85 Am. St. Rep. 667; Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 104 Am. St. Rep. 42; Scott v. Farmers' etc. Bank, 97 Tex. 31, 104 Am. St. Rep. 835. That a stockholder sustains to the directors the relation of a cestui que trust, see Pearson v. Concord, 62 N. H. 537, 13 Am. St. Rep. 590.

BOWDEN v. KANSAS CITY.

[69 Kan. 587, 77 Pac. 573.]

AL CORPORATION—Negligent Management of nicipal corporation is liable for negligence in the of public property in the discharge of a ministerial of whether or not an income is derived from it.

AL CORPORATION—Safe Place for Firemen to pal corporation is liable to a fireman for injuries its negligence in not furnishing him a reasonably k in one of its fire stations. (p. 192.)

AL CORPORATION — Fire Station — Ministerial re and management of its fire stations a city dis- ministerial duty. (pp. 192, 193.)

and Keplinger & Trickett, for the plaintiff in

ity counselor, and M. J. Reitz, city attorney, for n error.

E, J. The plaintiff prosecutes error from a ning a demurrer to his petition. The material the petition, which present 588 the question dis- pinion, briefly summarized, are that the defend- he first class, maintains a fire department and at plaintiff was in charge of station No. 3, in t a hose-cart and horses for drawing it; that to clasp the collar on the horses when they ir stalls to the tongue of the hose-cart upon the at the floor between where the horses stood and is cart, which had been laid with wooden blocks, vorn and rotten that a large hole had been made which the city had negligently permitted to re- period of time, notwithstanding the fact that f the fire marshal had frequently been called l repeatedly promised to cause it to be repaired; new the floor was out of repair and had negli- o put it in order; that on the occasion of plain- was in the discharge of his duties when a fire- d in and one of the horses made a dash for the ose-cart, where plaintiff was waiting to receive ollar of the harness, the horse stumbled into the

hole, falling heavily against the plaintiff, which resulted in serious injuries, for which he sought to recover damages in this action.

It is contended that the petition does not affirmatively show that the city had notice of the defective and dangerous condition of the floor, and that it affirmatively shows that the plaintiff assumed the risk of injury which would probably result from such defective condition of the floor. Neither of these contentions is well taken. In some particulars the petition is not very specific in its allegations, but it is not fatally defective in either of the respects mentioned. [589] It is plain that the court below did not sustain the demurrer on either of these grounds.

The important question, and one to which counsel have directed their attention, is, Can a municipal corporation be made to respond in damages to the plaintiff for injuries sustained through its negligence in not furnishing him a reasonably safe place in which to perform his duties as an employé in one of its fire stations? Nonliability is asserted on the ground that municipal corporations are created by the state to assist in the administration of its laws; that the maintenance of a fire department is a governmental duty, and in the performance of such duty cities are limited sovereignities, or miniature states, and are exempt from all liability for the misfeasance of their agents. Whether the corporation in this instance was acting as a governmental agency in a public capacity representing the inhabitants of the city, or in its private corporate capacity, is not a material question; in either instance it was acting within the scope of its delegated authority. It possessed the power to provide and maintain a fire department for the protection of the property of the inhabitants, and in this respect it was performing a public duty. In order that this power might be more effectually executed the office of the fire marshal was created. The mayor and council were given power to appoint such officer, prescribe his duties, provide for his salary, and control him in the discharge of such duties as were imposed upon him, and hold him responsible for the manner in which he should perform them. Therefore, the fire marshal, while so acting, was the agent of the city and not an officer of the state.

In determining the necessity of a fire department, the number and location of fire stations, the kind, [590] quality and number of fire-extinguishers, and all matters involving the efficiency of such department, the council are in the exercise of their legislative power, judgment and discretion. In the performance of

: questions of nonfeasance or misfeasance are not
ıdicial inquiry. Having, however, determined
, the execution of the work and the management
y is ministerial. In determining the locality,
de of streets, and in establishing a system of
: kind and location of the pipes therefor, the cor-
ses its legislative authority; in the one instance
ntal instrumentality; in the other, in its public
nefactor of the inhabitants. In either case the
o property owners for injuries to their property
the negligent execution of the plan.

City of Toledo v. Cone, 41 Ohio St. 149, 163,
o recover damages for personal injuries sustained
of an embankment supporting a vault in the city
e court said: "We think it is evident from these
sions that the trustees of the cemetery in question
y the people of Toledo, to take charge, as their
cemetery property, and acted in that behalf in
to and subject to removal by the council of the
The improvement or repair of the city vault,
agency and that of the superintendent, was not
r governmental act on the part of the city, but
e discharge of a ministerial duty, such as the
in repairing or improving its streets, sewers and
ay within the legislative capacity, judgment and
ne city to provide a cemetery for the burial of the
build requisite vaults; but, having become the
such property, the city in managing it was held
egree of care in preventing damage to others as
ired of natural persons. By section 8 of the act
municipal corporations are made capable of ac-
ng and possessing property, real and personal.
ower, there would seem to be no more valid rea-
pting them from liability for private injuries
improper management of their property than for
vate corporations and natural persons under like
"

of Donahoe v. Kansas City, 136 Mo. 657, 670,
574, which was an action to recover damages for
ned by the plaintiff while engaged as a laborer in
ch for a sewer, the allegations were that the city
appointed representatives in charge of the work
d carelessly failed to brace, shore up and protect

the walls of the trench sufficiently to make it a reasonably s
place for plaintiff to work. The court said: "It was a du
which defendant owed to plaintiff to furnish him a reasona
safe place in which to work. The superintendent of streets,
well also as the foreman in charge of the work, knew, or mi
have known had they discharged their duty, the unsafe con
tion of the bracing in this instance. 'This duty is personal
the master, and if intrusted to a foreman, the negligence of
foreman is the negligence of the master.'"

The court stated that the building of a system of sewers
for the private benefit of the corporation, and this may have h
some influence upon the court in determining the question
the liability of the city. This question will be referred to lat

Mr. Jones, in his work on Negligence of Municipal Corpo
tions, section 141, says: "But as soon as the corporation has
termined to [592] construct a public work, it enters upon
undertaking which, in all its details, should be subordinated
the rule requiring the use of care, for the work is then min
terial. There has been much discussion whether a munici
corporation will be liable for a defect in the plan of a pub
work, and many authorities have held broadly that it would n
The word 'plan,' however, in the cases, as is clearly shown in
recent case in the United States supreme court (Johnston
District of Columbia, 118 U. S. 19, 6 Sup. Ct. Rep. 923, 30
ed. 75), where this question was presented, is ordinarily us
to describe the general plan or system of work, and where it
so used, nothing more would seem to be decided than that
general features of the system of drainage to be adopted are
be settled by the corporation, and cannot be reviewed by
courts. Some authorities have gone much further than th
but it is believed to be contrary to principle and the weight
authority to maintain that, where in the performance of a pu
lic work, there is any breach of the duty to exercise care,
action by one who is damaged will not lie."

In McClure v. City of Red Wing, 28 Minn. 186, 194, 9 N.
767, it was said: "The duty of providing drainage or sewer
is in its nature judicial or legislative, and consequently a m
nicipal corporation is not liable for mere nonaction in faili
to perform it. But that is not this case. It has also been h
that, in adopting the general plan of an improvement, a mun
pality performs a legislative duty, whereas the manner of e
cuting it is a ministerial one. In the case at bar, if it turn
upon whether the duty was judicial or ministerial, we think

o apply would be that, in deciding upon the ex-
ying out this street, or upon the route thereof to
the grade to be established, the city was exercis-
uties, for errors of judgment in the performance
would not be responsible; but, having determined
and having decided it expedient to obstruct the
el of these waters, [593] and to divert them into
rtificial channel, then, in executing and carrying
ding the construction of the sewer and fixing upon
pacity, they were exercising purely ministerial
performance of which they are held to the exercise
care."

v. District of Columbia, 118 U. S. 19, 6 Sup. Ct.
, 30 L. ed. 75, the court used this language: "The
municipal authorities, in adopting a general plan
nd determining when and where sewers shall be
size and at what level, are of a quasi judicial na-
g the exercise of deliberate judgment and large
d depending upon considerations affecting the
and general convenience throughout an extensive
the exercise of such judgment and discretion, in
and adoption of the general plan or system of
ot subject to revision by a court or jury in a
for not sufficiently draining a particular lot of
But the construction and repair of sewers accord-
eral plan so adopted are simply ministerial duties;
negligence in so constructing a sewer, or keeping
he municipality which has constructed and owns
be sued by a person whose property is thereby

rinciple was announced in Thurston v. City of St.
o. 510, 11 Am. Rep. 463; Judd v. Hartford, 72
Am. St. Rep. 512, 44 Atl. 510; McCombs v.
of Akron, 15 Ohio St. 474; Barton v. City of
N. Y. 54; Jenney v. City of Brooklyn, 120 N. Y.
274.

line of authorities which hold that municipal cor-
liable for the negligent performance only of such
blic duties as are [594] imposed upon them by law,
e negligent performance of assumed duties which
only. To this doctrine we do not agree. The
f public duties which are imperative upon the cor-
ell as those which are merely optional, is for the

same general purpose—the general welfare of the community. When a municipal corporation assumes the performance of a public duty which was permissive only and enters upon the discharge of such duty, and through the negligent performance thereof by its authorized agents one is injured either in person or property, the corporation cannot escape liability by saying that the performance of this duty was not imperative. The principle here followed is well stated in Findley v. Salem, 137 Mass. 171, 50 Am. Rep. 289, and the reasoning therefor we think sound.

Many authorities may be found among the adjudicated cases where the liability of municipal corporations was based upon, and would seem to be limited to, instances where the duty negligently performed lay in the management of property for which the corporation derived an immediate income. Such distinction cannot be sustained by reason. The liability springs from the duty which is due from every person, whether natural or artificial, to exercise such reasonable care in the conduct and management of his property that it will not unnecessarily result in injury to another. A municipal corporation in control of public property is not exempt from this rule when discharging a ministerial duty. Mr. Jones, at section 150 of his work on Negligence of Municipal Corporations, says: "The obligation to exercise care does not arise between individuals because one pays money to another [595] and is therefore entitled to its exercise. It springs, as has been said, from the right of personal safety, and is wholly removed from the question of pecuniary profit. So between corporations, whether public or private, and individuals, the duty is not dependent on the payment of money. It comes into existence from the same right of personal safety. And it is not consistent with principle to hold that duty exists to exercise care in respect to remunerative public property, but that no such obligation arises in respect to public property from which no income is derived.

"Moreover, the weight of authority does not justify a distinction of this character. And an examination of the cases upon this question will sustain the conclusion that municipal corporations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property, irrespective of the question whether an income is derived from it."

In the care and management of the fire station the city was performing a purely ministerial duty. It was incumbent upon

s employés in charge of this property a safe place
ork, and if the plaintiff was injured through the
the city's agents in failing to perform this duty,
r such injuries.

nt of the court below is reversed, with instruc-
le the demurrer to the petition.

ces concurring.

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of Cities for the negligence and misconduct of their
nts is discussed at length in the monographic note to
pswell, 30 Am. St. Rep. 376-413. Generally speaking,
rations are not liable for failure to exercise, or for
ing, their legislative or judicial powers; but they are
t to perform, or for improper or unskillful perform-
nisterial duties: Mayor etc. of Dalton v. Wilson, 118
St. Rep. 101, and cases cited in the cross-reference
npson v. Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.
of a hose-cart connected with the fire department
s usual to his employment, but not the risks of the
e streets resulting from the culpable negligence of
rley v. Mayor of New York, 152 N. Y. 222, 57 Am. St.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

THOMPSON v. BROWN.

[116 Ky. 102, 75 S. W. 210.]

WILLS—Charitable Bequest—Certainty in Trust.—A will devising the testatrix's property to her executor to be by the latter distributed "to the poor in his discretion" creates a gift sufficiently definite to be enforceable under a statute requiring that charitable gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. (p. 195.)

Thompson & Spaulding, for the appellants.

H. P. Cooper, for the appellees.

104 BURNAM, C. J. The eleventh clause of the will of Elizabeth Thompson, who died in September, 1897, reads as follows: "I will and direct that my house and lot in Raywick, Kentucky, be sold at such terms as my executor may deem best, and I will that the proceeds together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses shall be collected by my executor, and by him distributed to the poor in his discretion." The only question for decision upon this appeal is whether the gift in this clause is sufficiently definite to be enforced under section 317 of the Kentucky Statutes of 1899, which requires that such gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. Very different rules from those that are applied in establishing and administering private trusts will be applied in order to give effect to the intention of a donor to establish a public charity. In discussing this question,

s, section 687, uses this language: "If in a gift
fit the cestuis que trustent are so uncertain that
identified, or cannot come into court and claim
erred upon them, the gift will fail. But if the
r a public, charitable purpose, it is immaterial
is uncertain or incapable of taking, or that the
harity are uncertain and indefinite. Indeed, it
gueness is in some respects essential to a good
charity, and that a public charity begins where
he recipient begins." The general doctrine upon
charitable bequests is that the beneficiaries should
a class only, leaving the number [105] and indi-
termined by the trustees who administer it. De-
r have always been favorite modes of dispensing
olent persons, and trusts created for this purpose
ally upheld by the courts. In Moore's Heirs v.
s, 34 Ky. 354, 29 Am. Dec. 417, it was decided:
rtainable object is designated by the donor in
lectible terms, as the poor of a given county or
a person is appointed by him to select a de-
or kind or number from a designated class, the
ng as judge in equity, will interpose on the
" In the case of Curling's Admrs. v. Curling's
38, 33 Am. Dec. 475, James Curling left the
state for the use and benefit of a public semin-
ating where it was to be located. The circuit
devise void for uncertainty, but, upon appeal to
e Robertson, delivering the opinion of the court,
atrix, by designating a general object of charity
ary), must be understood as intending either a
seminary of his county, or any seminary which
a court of equity, in the exercise of a sound dis-
select as best adapted to effect the object of
either of these hypotheses, the testator's pur-
l and circumscribed by himself, may be fulfilled
fund to a specific object, without any hazard
s bounty in a manner not contemplated by him
by his will. Therefore, according to principles
erfectly judicial, we are of the opinion that the
charitable trust, which may be executed accord-
l without violating the will of the testator or
for him, and therefore we conclude that the cir-
t to [106] have decreed the appropriation of the

profits of the devise to the use of the Triggs Seminary, and appointed a trustee to execute the trust." In the very recent case of Spaulding v. St. Joseph's Industrial School, 107 Ky. 382, 21 Ky. Law Rep. 1107, 54 S. W. 206, Judge Du Relle uses this language: "All the Kentucky cases have sustained the charitable uses therein considered because the court held that a charitable object was indicated, or a class of charitable objects designated from which choice was authorized to be made. In some of them there is room for difference of opinion as to the certainty of the objects of the charitable uses sustained, but the courts have always held that they were certain, either by being designated by the donor, or one of a class designated by him from which choice was authorized to be made." In Bedford v. Bedford's Admr., 99 Ky. 273, 18 Ky. Law Rep. 193, 35 S. W. 926, the devise was to the state of Kentucky in trust for the benefit of the state, the profits therefrom to be appropriated annually forever toward the education of the children of the state—particularly the poor and most unintelligent. The devise in this case was sustained as sufficiently definite. The court said: "Trusts must be for the benefit of an indefinite number of persons, for, if the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity, and which distinguishes it from a mere private trust."

There has been considerable diversity in the decisions of the courts of the various states of the Union as to the extent they will go in upholding an indefinite trust. In some states—particularly Maryland, Virginia, Michigan, New York and Wisconsin—it has been held that courts of equity have no greater jurisdiction to enforce public than private trusts. On the other hand, in Kentucky, Maine, Massachusetts, Missouri, Pennsylvania and many other [107] states where the principles of 43 Elizabeth, chapter 4, are accepted, they have gone to the farthest limit in this regard. In this state sixteen decisions have been reported upon this question of charitable uses, beginning with the case of Gass v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446, in which charitable bequests have been uniformly upheld. But it is insisted that the amendment to section 317 of the Kentucky Statutes passed by the General Assembly in 1893, which is in these words, "if the grant, devise, gift, appointment or assignment, shall have pointed out with reasonable certainty the purposes of the charity and the beneficiaries thereof," etc., was intended by the law-making department of the government

rule which has heretofore prevailed in this state. the amendment are the same as those used in ns sustaining bequests to various charities, and it e consistent with reason and common sense to be- legislature simply intended to crystallize into the e doctrine which has been so often announced by d which has been accepted with approval by the e General Assembly, the public at large, and by text-writers. The gift in this case is to the poor d the testatrix has appointed her executor to se- class the persons who are to receive the benefit of In our opinion, the judgment of the trial court vith what has become the settled legislative policy vith respect to public charities; and Spalding v. ndustrial School, 107 Ky. 382, 21 Ky. Law Rep. '. 206, relied on to support the judgment of the not in conflict with the other cases, and the de- e should be upheld.

indicated, the judgment is reversed, and cause proceedings consistent with this opinion.

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sty and Unity required in charitable trusts, see the e to Fifield v. Van Wyck, 64 Am. St. Rep. 756-772. ust for the benefit of the poor, to be given to such rustees shall deem worthy, is a valid charitable be- Saunders, 121 Iowa, 80, 100 Am. St. Rep. 310. See, phic note to Hoeffer v. Clogan, 63 Am. St. Rep. 263; tt, 30 Colo. 231, 97 Am. St. Rep. 117.

I COUNTY v. HENDERSON BRIDGE COMPANY.

[116 Ky. 164, 75 S. W. 239.]

NTS Against Public Officers—Conclusiveness Against er statutes, the sheriff of a county, in so far as his taxation, is merely a tax collector, a judgment by im in a suit by a taxpayer to enjoin the collection of the county is not made a party is not conclusive or a subsequent action by it to collect such taxes. In eriff, as tax collector, is not the legal representative in privity with it, so as to make a judgment against n the county. (p. 200.)

M. Merritt and N. P. Taylor, county attorney, for appellant.

Helm, Bruce & Helm and Yeaman & Yeaman, for the appellee.

[176] HOBSON, J. The county of Henderson instituted suit against the Henderson Bridge Company to recover certain taxes alleged to be due for the years 1893, 1894, 1895 and 1896. The bridge company resisted judgment on the ground that every item of the taxes sued for had been adjudged illegal in suits [177] brought by it against the sheriff of Henderson county, final judgment having been entered in each of these suits perpetually enjoining the collection of the taxes. The plaintiff demurred to the plea of res judicata. The court overruled the demurrer, and, the plaintiff declining to plead further, the action was dismissed. The only question to be determined on the appeal is whether the judgments rendered in the former actions by the bridge company against the sheriff bind the county, although it was not a party to those suits. In those cases the bridge company alleged that Henderson county had levied no tax for the years named, that its property had not been assessed for taxation, and that the sheriff had not been authorized to collect the tax. The sheriff did not answer the petition, and judgment by default was entered to the effect that the plaintiff did not owe the tax, perpetually enjoining the sheriff from collecting it. Appellee relies on the principle that a judgment against the legal representatives of a county is conclusive against it and all its citizens. The rule is thus stated in Freeman on Judgments, section 178: "The position of a county or municipal corporation toward its citizens and taxpayers is, upon principle, analogous to that of a trustee toward his cestui que trust, when they are numerous, and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit." To same effect is Black on Judgments, section 584. The principle stated in these sections is that a judgment against a county or its legal representatives in a matter of general interest to all the people of the county is binding not only on the official representatives of the county, [178] but on all its citizens, though not made party defendant by name; otherwise there would be no end to litigation. But no question arises in this case between any of the citizens of Henderson county and appellee. The only ques

r the county is bound by default judgments in
lee in actions between it and the sheriff, to which
not a party. The question how far a municipal-
ınd by a judgment against one of its subordinate
touched upon in either of these sections. In the
section 178 of Freeman on Judgments, it is said:
ficer is a nominal party to a suit, and the munici-
joined with it, a judgment is conclusive for or
t was the real party in interest, and as such pros-
nded the action." The rule that one who prose-
ds an action in the name of another is bound by
though not nominally a party to it, is of general
ıd has been recognized by this court: Schmidt v.
R. R. Co., 99 Ky. 143, 18 Ky. Law Rep. 65, 35
S. W. 168. But this rule does not apply here,
was made to the action against the sheriff. The
nst the municipality binds its citizens, because it
representative; but can it be said that the county
he default judgment against the sheriff for this
dgment binds only parties and privies. The heir
judgment against his ancestor; the distributee by
against the administrator; but, unless there is
one person is never bound by a judgment against
ground upon which a municipality is held bound
against certain of its officers is that these are its
tatives, who are by law authorized to speak for
its affairs; but this cannot apply to subordinate
agencies having no power to speak for the mu-
ontrol its action. In none of the adjudged cases
cipality been held bound by a default judgment
f its officers, except those who had charge of its
hief managing agents. Thus, in Lyman v. Faris,
5 N. W. 621, the validity of a tax having been
an action against the board of supervisors, who
aging agents of the county, it was held that an
in the collection of the tax could not be main-
xpayer, as the supervisors represented all the tax-
county in the defense which they had made to
tion on the same ground. To the same effect are
y, 74 Mo. 229; Harmon v. Auditor, 123 Ill. 122,
p. 502, 13 N. E. 161. In Gallagher v. Mounds-
a. 730, 26 Am. St. Rep. 942, 12 S. E. 859, certain
g for themselves and all other taxpayers of the
t an injunction against the delivery of certain

bonds, which was refused. Then other taxpayers, who we not named as parties in the first suit, brought a similar sui suing for themselves and all other taxpayers. The first actio was held a bar to the second. See, to same effect, McCann Louisville, 23 Ky. Law Rep. 558, 63 S. W. 446. Were the ru otherwise in this class of cases, there could be no end to litig tion until every taxpayer in the county had brought his ind vidual suit. In Sauls v. Freeman, 24 Fla. 209, 12 Am. S Rep. 190, 4 South. 525, the county commissioners were sough to be enjoined from moving the county records in a proceedin instituted by certain taxpayers. There had previously been mandamus awarded against the commissioners to remove th records, and this judgment was held to bar the second suit but the commissioners were empowered by law to remove th 180 records and were, therefore, the representatives of the pe ple of the county in this matter. State v. Chester etc. R. I Co., 13 S. C. 290, rests on the same ground. None of the cases involved a judgment against an inferior ministerial offic who was not by law intrusted with the disposition of the ma ters in controversy. In no case cited or decided, so far as w can find, has an inferior officer been allowed to accomplish i directly by means of a judgment against him what he could n do directly. In all the cases where the judgment against th officer was held a bar, his official act without the judgme would have bound the municipality. The question, then, to b determined is, Has the sheriff in the collection of taxes suc power, under our statute, as to make him the legal represent tive of the county so that a judgment against him will bind th county?

By section 4129 of the Kentucky Statutes of 1899, "th sheriff by virtue of his office shall be collector of all stat county and district taxes, unless the payment thereof is, by la specially directed to be made to some other officer." This sta ute confers upon him only power to collect the taxes. The mo of collection is pointed out in sections 4148, 4151, 4184, of th Kentucky Statutes of 1899, by distraint, levy on land, or a tachment. By section 4131, if the office of sheriff is vacan the county court may appoint a collector of taxes. The powe of the sheriff are the same as those of the tax collector. B section 114 of the constitution each county shall have a fisc court, composed of the county judge and justices of the peac or a county may have three commissioners, who, together wit the county judge, shall constitute the fiscal court. Pursua to this provision of the constitution is section 1834 of the Ke

of 1899: "Unless otherwise provided by law,
181 powers of the several counties of this state
ed by the fiscal courts thereof respectively." Also
"The fiscal court shall have jurisdiction . . . .
l control the fiscal affairs and property of the
and to execute all of its orders consistent with
thin its jurisdiction, and shall have jurisdiction
er matters relating to the levying of taxes as is
act now conferred on the county court or court
ims." By section 1883 the officer who may col-
revenue in each county shall also collect the
t will thus be seen that the entire control of the
the county is vested in the fiscal court, of which
ot a member, and that his sole power in the mat-
imited to that of a tax collector. The powers of
and the limitations upon his authority are thus
Cooley on Taxation: "The authority of a col-
to collect is his warrant. The duplicate is but
of the amount he is to collect from the parties
respectively. Without a warrant, the collector
passer as soon as he intermeddles with the prop-
payer": Page 292. "It is not the business of the
estion the fairness or propriety of any tax which
nitted to him for collection. If the assessment
e party assessed must make the objection, and not
His duty is to collect the list committed to him,
excuse himself for any failure to exhaust his au-
lecting on the pretense that the person taxed
en assessed otherwise than he was": Page 500.
ny mere ministerial officer to whom process is is-
roceeds from an officer, or board, or other body
ity to issue process of that 182 nature, which
l in form, and contains nothing on its face to
ise him that it is issued without authority, will
n serving it, even though in fact it was issued
rity of law. This is a rule not only essential to
of such officers, but absolutely required also for
ch of public business": Page 559. The tax col-
re, in the collection of his tax warrants, stands
s the sheriff in executing a fieri facias or other
hich is delivered to him. In acting under such
cer is protected if the writ is valid on its face.
agent of the plaintiff. The sale made by him is

the act of the law, and the plaintiff in the writ is in no
bound by the acts of the officer if he leaves the law to take
course without directing the officer in the discharge of
duties: Freeman on Executions, sec. 273; Rorer on Judi
Sales, sec. 46. The sheriff, in the collection of his revenues
a ministerial officer, charged with a specific duty, which is
collect the money on the tax bills, and pay it over to the per
entitled to receive it. He is without power to dispose of
fund, or to release the taxpayer from liability, or to reduce
amount to be paid by him, or to do anything involving the fi
interests of the county. He has no authority to represent
county in any litigation. He cannot employ counsel for
or subpoena witnesses on its behalf, or do any act at its exper
however necessary, in the litigation for the protection of
rights. In the collection of the public dues, he is simply
agent of the law, performing duties imposed on him by the l
The county is not responsible for his acts out of court unl
it directs or controls them; and the same rule must apply
his acts in court, for he cannot accomplish by nonaction
court what he could not accomplish by direct [183] action out
court. The law does not impose on the sheriff the burden
defending suits against the county. The expense of such liti
tion might be far beyond his means. When the rights of
county are to be determined, it should be sued, so that it m
control the defense, pay the expenses, and take such steps
its interests may require. There are other officers charged w
certain duties ministerial in character in connection with
collection of taxes that must be regarded as the representati
of the county if the sheriff can be so regarded. Thus it is
duty of the assessor to assess the taxpayers. But it would
be maintained that a default judgment suffered by an asses
enjoining him from assessing the property of a taxpayer wou
bar the state or the municipality from proceeding under secti
4241 of the Kentucky Statutes of 1899, to have the omitt
property assessed. It is the duty of the county clerk to co
the tax list and deliver the copy to the sheriff for him to coll
on. If a taxpayer were to enjoin the county clerk by a defa
judgment from copying his list and delivering it to the assess
this judgment would not conclude the commonwealth or
county, or prevent it from collecting its taxes.

None of the tax cases decided by this court touch the qu
tion. It is true, suits to test the validity of taxes have be
brought in the name of the sheriff, and, where the litigati

ucted by the state or municipality in the name of
s bound by the judgment; but the interests of the
of the state, as well as sound legal principles,
hey should be made parties defendant to actions
x collector, where the purpose of the action is to
from collecting their revenues, for the power to
he power to exist, and their usefulness might be
destroyed if the collection of taxes levied for
could be defeated by judgments in actions over
d no control. A county may be sued. Section
Code of Practice provides: "In an action against
summons must be served on the presiding judge
court, or, if he be absent from the county, upon
In People v. Squire, 110 N. Y. 666, 18 N. E.
tiff had obtained a mandamus against the com-
public works, and relied on that judgment as res
ween him and the city. The court, deeming the
doubt, simply said: "The city of New York is
the litigation, and is not bound by any judgment
ered in this proceeding." In the subsequent case
te, 137 N. Y. 372, 33 Am. St. Rep. 738, 33 N. E.
approving this case, said: "In People v. Squire,
[18 N. E. 362], we held that a judgment in a
roceeding against the commissioner of public
city of New York did not bind the city for the
was not a party to the litigation." In Gilmore
an. 509, a suit was brought against the county
nty treasurer to enjoin the collection of certain
ade by the city of Emporia, without making it a
held that the city was the real party in interest,
essary party to the action. The court said: "If
t collect these special assessments, it must resort
ation to raise the amount. But, before it can be
mined that the city cannot collect these special
he city must have its day in court." The same
followed in Voss v. Union School Dist., 18 Kan.
suit to enjoin a collection of taxes was brought
easurer and sheriff. The court said: "Said treas-
sheriff were merely nominal parties, and the
was the real party in interest." To the same
pf v. Chicago Real Estate Board, 173 Ill. 196, 50
einroth v. Kochersperger, 173 Ill. 205, 50 N. E.
lley v. Gilbert, 155 Ill. 154, 39 N. E. 593. In the

last case an effort was made to enjoin the action of the county board as to dieting prisoners without making the county of Cook defendant. The court said: "Whatever may be said as to the right or policy of county boards to adopt the method of fixing the amount to be paid for dieting prisoners shown by this bill to have been pursued in Cook county, before that method can be judicially pronounced contrary to law and void, the alleged offender must be given its day in court": See, also, Beach on Injunction, 373; Carpenter v. Grisham, 59 Mo. 251; Samis v. King, 40 Conn. 312; Lefferts v. Board of Supervisors, 21 Wis. 688; 10 Ency. of Pl. & Pr. 913, 914; Attala County v. Niles, 58 Miss. 48.

The other questions made in the case seem to be settled in Henderson Bridge Co. v. Negley, 23 Ky. Law Rep. 746, 63 S. W. 989; Louisville Bridge Co. v. Louisville, 23 Ky. Law Rep. 1655, 65 S. W. 815; Campbell County v. Bridge Co., 112 Ky. 659, 23 Ky. Law Rep. 2056, 66 S. W. 526.

The judgment is reversed and cause remanded, with directions to sustain the demurrer to so much of the answer as pleads the former adjudication in bar of the action, and for further proceedings consistent herewith.

WHO ARE BOUND BY A JUDGMENT FOR OR AGAINST A MUNICIPAL OR OTHER GOVERNMENTAL BODY OR ITS OFFICERS.

I. General Principles Controlling the Question, 205.

II. Of the Effect of a Judgment Against the State, the United States, or Other Governmental Body.
- **a. As Against the State or the United States, 205.**
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III. Judgments Against Governmental Bodies, When Conclusive on Persons not Parties Thereto.
- **a. Respecting Matters of General Interest, 208.**
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- **c. Interests Distinct from Those of the General Public, 209.**

IV. Effect as Against a Governmental Body of a Judgment in an Action or Proceeding Against Its Officers.
- **a. Judgments in Actions or Proceedings Against Officers of the State, or the United States, 210.**
- **b. Judgments in Actions by or Against Other Governmental Bodies, 211.**

V. Effect Against Third Persons of Judgments for or Against Public Officers.
- **a. Successors in Office, 211.**
- **b. Another Officer of the Same Governmental Body, 212.**
- **c. Taxpayers and Citizens, 213.**
- **d. Bondholders and Others, 215.**

VI. Effect of a Judgment Against the Same Officer When the Representative of a Different Interest, 217.

sneral Principles Controlling the Question.

idered this question to some extent in People v. Hol-
1, 27 Am. St. Rep. 186, 29 Pac. 54, but its importance
arrant further attention. It is well known that a
ner judicial decision is not always in its effect re-
parties to the action or proceeding in which it was
nrther, that it is rarely or never so restricted when
persons are permitted to assume, and do assume, the
l control of the litigation, and are hence the active
nor when, whether they so manage or control or not,
rights must, as a matter of law, be taken to be
the parties before the court. By the application of
the questions here considered should be, and generally
olled.

pal case emphasis is laid on the fact that the judg-
was rendered upon default, and perhaps the language
warrants the inference that judgments by default in
ses necessarily and universally are less effective than
ting from actual or protracted litigation. It would
ng too far to say that a judgment against a govern-
its officers can have no effect as res judicata when
default. To so hold might practically result in the
ctive remedies by refusing to answer in the cases in
sought. No doubt, on the other hand, exists that a
llusion cannot operate as res judicata against persons
reto, and furthermore, that officers cannot, by their
r to defend, give conclusive validity to their unlawful
ish purposes which they are without power to accom-
action. When it is sought to bind a governmental
zens or taxpayers by a judgment rendered against an
t or consent or which he otherwise failed to defend in
fact is always material and will often be received as
on for not treating the judgment as res judicata, on
t, substantially, there has never been any litigation
the questions involved: Kane v. Independent School
5, 47 N. W. 1076; Henderson County v. Henderson
Ky. 164, ante, p. 197, 75 S. W. 239; Lindsay v. Allen,
32 S. W. 171; Kelly v. Town of Milan, 127 U. S. 139,
1101, 32 L. ed. 77.

ct of a Judgment Against the State, the United States, or Other Governmental Body.

st the State, or the United States.—There is, we ap-
ubt if an action is instituted by the state or the
r against either, in a case where the law permits it to
e judgment therein has the same effect as res judicata
ll its officers and agencies as would a judgment in an

action against a private person in an action brought by or against him. Hence, if in a suit by a state to recover taxes claimed to be due from a corporation, a judgment is rendered declaring it to be exempt from taxation, this is conclusive in favor of such exemption in all subsequent actions to recover taxes from such corporation: Bank of Kentucky v. Stone, 88 Fed. 383, affirmed 174 U. S. 799, 19 Sup. Ct. Rep. 881, 43 L. ed. 1177; Mercantile Nat. Bank v. Hubbard, 105 Fed. 809, 45 C. C. A. 66; Baldwin v. State, 89 Md. 587, 43 Atl. 857; affirmed, 179 U. S. 220, 21 Sup. Ct. Rep. 105, 45 L. ed. 160. While the general rule was conceded in Kansas City etc. Park v. Kansas City, 174 Mo. 425, 74 S. W. 979, the court restricted its application to actions for taxes levied for the same purposes as those in question in the former litigation, and in sustaining this limitation to the general rule, we think, erred, and confessedly refused to follow the decision of the national court on the same question: New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202; Mercantile Nat. Bank v. Hubbard, 105 Fed. 809, 45 C. C. A. 66.

Various proceedings may be brought in the name of the state, as, for instance, in quo warranto or by application for other writs, in which, though the state is nominally a party, the proceeding is at the relation of, or for the benefit of, some individual. Judgments in such proceedings are not binding on the state as res judicata, and do not preclude it from pursuing any remedy which it otherwise has: Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; State v. Stock, 38 Kan. 184, 16 Pac. 106, 799. A suit may be brought by the state, or the people of the state in which it is merely the representative of the person or persons whose rights have already been considered in a prior action or proceeding, in which case the effect of the judgment in such action or proceeding is not limited by the fact that the second suit or proceeding is brought in the name of the state, or of the people thereof. This is illustrated by People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54, which was an action by the attorney general of the state in the name and in behalf of the people thereof, upon the relation of one Bryant, to recover a tract of land in the city and county of San Francisco, which, it was claimed, had been dedicated to the public use as a public square. In defense to this action, it was shown that an action had been begun by the defendant Holladay against the city and county of San Francisco, in which the square was situated, to quiet his title thereto, and that a judgment had been rendered to the effect that he was the owner of the undivided nineteen-twentieths of such square, and his title thereto was quieted against the city. It was held that in the former suit the city and county of San Francisco represented the public, and that the judgment was hence conclusive against them and constituted a complete defense to the action brought in the name of the people of the state.

was brought by taxpayers against the commissioners
obtain an injunction to prevent their issuing bonds,
ulted denying the injunction and affirming the right
s, which were thereupon issued and sold, such decree
conclusive defense to a subsequent action brought
he state upon the relation of citizens and taxpayers
ity to have the bonds declared null and void. This
ced upon the ground that the state had no substan-
he action in which its name was used, and the two
the benefit of the same class of persons, and "it is
suppose that the state, in lending its name to in-
protection of their rights, intended to subvert the
ing controversies of the class to which this belongs":
etc. R. R. Co., 13 S. C. 290. The test, therefore, by
ine whether actions in the name of the state can be
of a previous judgment or other judicial decision is
the second action or proceeding attempt to enforce
ction or defense in or to which it has a substantial
, or is its name merely formally used in a proceed-
as not such a right or interest and in which the real
st are those bound by the former decisions? Some
ist in applying this test. Thus, in questions aris-
t to county seats, the county and the citizens
s have a general and more direct interest in the
s the state or the people thereof, and yet it may be
d the people thereof have a right and interest which
not be precluded from asserting because of a prior
against the county and its citizens. This question
ted in several cases in Kansas. The courts of that
e conclusion that where a proceeding was brought by
county to compel a county officer to remove his
claimed to be the county seat, the judgment therein
the state from proceeding by its attorney general
relitigate the same question. These decisions were
ground that "the state can interfere in matters of
interest of peace and good order, and to command
laws, and that for this purpose it cannot be concluded
t by private persons to protect or enforce private
at, "while the statute permits any elector who con-
ggrieved by the result of any election held for re-
hing, or relocating the county seat of a county to
tion in the district court such election, yet if different
ught, and different judgments are rendered, it is
e attorney general or the county attorney, in the
public, may, in a proper action instituted for that
l these different judgments reviewed and superseded
dication as to which town, city or place is the legal

county seat of a county, and thus bring all the county officers, the books, papers, and records, to such town, city or place as county seat": Garner v. State, 28 Kan. 790; State v. Stock, 38 154, 16 Pac. 106.

b. **As Against Lesser Governmental Bodies.**—The rules enforce against the state and the United States apply to lesser governm bodies. Therefore, if a town sues bondholders for the purpos canceling bonds held by them, and, after a trial on the merits, fai sustain its suit, the resulting judgment is equivalent to an af ance that the bonds are valid and should not be canceled, which, subsequent action brought by the bondholders against the t estops it from maintaining that the bonds are invalid: Williamsb S. B. v. Town of Sloon, 136 N. Y. 465, 32 N. E. 1058.

III. Judgments Against Governmental Bodies, When Conclusiv Persons not Parties Thereto.

a. **Respecting Matters of General Interest.**—A judgment agai governmental body, whatever its rank, cannot be conclusive on a son not a party to the record, except upon the same principles to the same extent that a judgment against a private person ma conclusive on one not a party to the action or proceeding. This only be in the cases and to the extent to which a party to a litiga must be deemed a trustee or representative of persons not nomi parties thereto. A state, county, municipality or other gov mental body is a representative of its citizens and taxpayers certain purposes and not otherwise. With respect to the purp for which it is not their representative, a judgment against it ca affect them as res judicata, while, as to matters in which it is t representative, such a judgment is as conclusive on them as if were parties to the record. Thus, a municipality represents its payers in respect to the taxes which shall be levied against the their property. Hence, if an action is brought to obtain a judgm against the municipality on a liability alleged to exist against it a suit or other proceeding is instituted against it to compel the of taxes to discharge an alleged liability, a judgment for or aga the city is conclusive for or against the taxpayers that the munici ity is or is not subject to the liability, and should or should not the taxes as may have been decided by the court: Harmon v. B of Public Accounts, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. Clark v. Wolf, 29 Iowa, 107; McEntire v. Williamson, 63 Kan. 275 Pac. 244; Taxpayers v. O'Kelly, 49 La. Ann. 1039, 22 South. Shanahan v. City of South Omaha (Neb.), 89 N. W. 285. So, claim is made that certain property has been dedicated to a pu use as a public square, a judgment against the municipality is clusive on all its inhabitants, because in the litigation they represented by it, and while it was the nominal, they were the parties in interest: San Francisco v. Holladay, 76 Cal. 18, 17

ounty of San Francisco v. Itsell, 80 Cal. 57, 22 Pac.
lladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54;
k, 150 Ill. 303, 37 N. E. 207; Xiques v. Bujac, 7 La.
udgment against a county or its legal representatives,
eneral interest to all its citizens, is binding on the
ey are not parties to the suit. Every taxpayer is
ot a nominal, party to such judgment, and cannot
the questions which were litigated in the original
he county or its legal representatives, and, if the
il to avail itself of legal defenses, the people are
judgment. If such failure comes from negligence
e taxpayer has a remedy on both the criminal and
he courts, and if from incompetency, the taxpayer's
llot-box. Such judgments must be conclusive unless
aud or mistake. They must be conclusive or not ad-
Bear v. Commissioners of Brunswick Co., 122 N. C.
Rep. 711, 29 S. E. 719.

Matters not of General Interest.—It will be ob-
limitation upon the rule, the judgment is required to
of general interest to the citizens or taxpayers. In
obvious that it would be impracticable to make all
and that they must hence be bound by a judgment to
em were not parties or they cannot be bound at all.
volved is of interest to a few or to only one of them,
t to be affected must be made parties to the proceed-
ned that a special assessment should be made against
an individual, and a proceeding in mandamus is ac-
t against the municipality and its officers to compel
uch assessment, that is, in effect, a proceeding to
rty of certain persons with the payment of the ap-
and the proceeding cannot be made effective against
are made parties thereto. They may, notwithstand-
granted and the assessment made pursuant thereto,
ment on the same ground which would have been
the assessment had been voluntarily made without
writ of mandamus: Rork v. Smith, 55 Wis. 67, 12

istinct from Those of the General Public.—Whenever
roperty owner has an interest distinct and different
public, he cannot, as to that interest, be estopped
against the municipality. Thus, if he is the owner
tting on a public street, his rights cannot be de-
judgment against the municipality fixing the bound-
et so as to interfere with the use of his property:
119 Iowa, 267, 97 Am. St. Rep. 315, 93 N. W. 282;

James v. City of Louisville, 19 Ky. Law Rep. 447, 40 S. W. 912. A suit by a taxpayer against a municipality resulting in a decision that a certain ordinance is ultra vires and void does not estop a corporation not a party to the suit, nor preclude it from maintaining a claim based on such ordinance: City of Detroit v. Detroit Ry. Co., 134 Mich. 11, 95 N. W. 992, 99 N. W. 411.

IV. Effect as Against a Governmental Body of a Judgment in an Action or Proceeding Against Its Officers.

a. Judgments in Actions or Proceedings Against Officers of the State or the United States.—Neither the state nor the United States can be sued without its consent. Therefore, it often becomes necessary for private persons to bring actions against officers of the state or the United States, either to compel such officers to perform some duty resting on them as such, or to relinquish possession of property which they claim to hold in their official capacity. Thus, if an officer of the state or of the United States holds possession of property of which an individual claims the ownership or present right of possession, the latter may maintain an action of ejectment to recover possession, but the judgment in such action, while it may be executed to the extent of placing plaintiff in possession, does not have the effect of res judicata against the United States, for to give it that effect would be to concede the right of a private person to sue the sovereign in a case where that right had not been granted by law: Carr v. United States, 98 U. S. 433, 25 L. ed. 209; Adams v. Bradley, 5 Saw. 217, Fed. Cas. No. 48. One basing his claim upon a contract made with the board of managers of the Buffalo state insane asylum of New York procured a judgment in mandamus against that board requiring it to adjudge and determine the amount due, and a reference being had, such amount was determined and a judgment entered directing mandamus to issue requiring a determination to be made in favor of the claimant for that amount. In a subsequent proceeding before the court of claims of the same state, the plaintiff relied upon such judgment and certificate, offering no further evidence in support of his claim. The question was afterward presented to the court of appeals whether the judgment in mandamus estopped the state, and was answered in the negative, the court saying: "The state was not a party to that proceeding, and in that proceeding the asylum managers did not represent the state. It was a proceeding against them to compel them to discharge what was claimed to be a duty resting upon them under the law of their creation and the contracts into which they had entered. While they represented the state in making the contracts with Linus Jones Peck & Co., they did not stand in the place of the state in any suit brought against them, either for misfeasance or nonfeasance in the discharge of the duties devolved upon them by law. No provision is found in any statute giving them authority to represent the state in any litigation, or giving the con-

to be bound by any adjudication to be made against
annot be sued in its own courts, except by its con-
le is founded upon public policy of great importance,
greatly impaired and could be largely nullified if
e bound by judgments rendered against its agents or
dgments may bind the officers and compel them to
duties, and thus frequently they enable claimants
nt of their claims against the state and other rights
re entitled by law. But the adjudication in such
tops the state on the principle of res adjudicata'':
37 N. Y. 372, 33 Am. St. Rep. 738, 33 N. E. 317.

in Actions by or Against Other Governmental
ction or proceeding is brought by or against an officer
n or other governmental body to which it is the real
t, and where it is subject to the suit of a private
e regarded as though it were the nominal, as well as
and the decision ultimately reached is as binding
judicata as if the action or proceeding had been
the judgment rendered against, it directly: Millikan
ette, 118 Ind. 323, 20 N. E. 847; Board of Commission-
6 Ind. 450, 60 N. E. 150; Ashton v. City of Rochester,
8 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334; Fulton
Wis. 663, 87 N. W. 831; Stone v. Bank of Kentucky,
rmed, 174 U. S. 799, 19 Sup. Ct. Rep. 881, 43 L. ed.
is inapplicable when the officers are independent
hose duties are prescribed by law and who are in no
tives of the office, as where an adjudication is made
in a statutory proceeding against them for the re-
ssments, and the attempt is made to apply such ad-
gainst assessments made for another year: People v.
Y. 513, 52 N. E. 570.

nst Third Persons of Judgments for or Against Public Officers.

in Office.—In a great majority of actions by or
officers they are not personally interested, and hence
parties, and the judgment may be ineffective unless
y be regarded as representatives of the real parties
are consequently bound by the judgment. In so far,
blic rights are involved, a successor in office is in
is predecessor, and is hence bound by a judgment
ter. If the latter has been enjoined from doing an
r is equally enjoined, and if, on the contrary, a judg-
entered against a public officer authorizing the issuing
nandamus to compel the performance of an act, the
nance rests on his successor in office: State v. Board
rs, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984;

Holdsworth v. O'Chander, 49 Neb. 42, 68 N. W. 334; State v. Kennedy, 60 Neb. 300, 83 N. W. 87; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; State v. Kispert, 21 Wis. 392; Starr v. Chicago etc. Ry. Co., 110 Fed. 3; New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202. This applies against officers of the state, as well as against officers of counties, towns and other subordinate governmental bodies: State v. Kennedy, 60 Neb. 300, 83 N. W. 87; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557; Starr v. Chicago etc. Ry. Co., 110 Fed. 3; New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202. The only decision which we have discovered which may not be reconcilable with this rule is that of Greenleaf v. Board of Commissioners, 123 N. C. 30, 31 S. E. 264, in which it was said, though not necessary to the determination of the case, that a judgment enjoining county commissioners from accepting and maintaining a bridge could not prevent a subsequent board "acting in their legislative and discretionary capacity" from accepting the same bridge and making its maintenance a county charge.

b. **Another Officer of the Same Governmental Body.**—Where officers of the same governmental body represent the same interest, a judgment against one must be conclusive in a subsequent proceeding by or against the other. If a judgment in favor of a township trustee is on the ground that an allottee of a public ditch did not clear out his allotment as he pretended and as required by the plans and specifications, and the judgment affirms the right of the township to clear out such allotment, such judgment is conclusive in a subsequent suit to enjoin the county treasurer from collecting the expenses of such clearing out, for the parties in interest are the same in each case: Zimmerman v. Savage, 145 Ind. 124, 44 N. E. 252; McClesky v. State, 4 Tex. Civ. App. 322, 23 S. W. 518. If a judgment in ejectment is rendered against a state official in possession of land claimed to be state property, another state official is thereby barred from coming in by petition and setting up the same defenses asserted in the answer of the first official, and having the judgment reopened: Vance v. Wesley, 85 Fed. 157, 29 C. C. A. 63. If a town is enjoined from enforcing illegal taxes, this is conclusive in an action against its board of assessors to prevent them from certifying such taxes for collection. "If the parties in interest in whose favor the tax is assessed are bound by prior litigation, certainly the agencies acting for them under the law are equally bound": Bank of Kentucky v. Stone, 88 Fed. 383; Mercantile Nat. Bank v. Hubbard, 105 Fed. 809, 45 C. C. A. 66; City of New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202.

So far as we can understand it, the language of the court in State ex rel. National Co. v. St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113, is in conflict with the views above expressed, and is altogether unmaintainable. State v. Murphy, 134 Mo. 548, 56 Am. St. Rep. 515

4 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, was a pro-
lamus brought by the state on the relation of the St.
ınd Seryice Company against Murphy, street commis-
ı a judgment compelling him to grant a permit, and
enied, on the ground that certain ordinances of the
which the relator's claim depended were ultra vires,
The second proceeding was also in mandamus, but
the relation of the National Subway Company and
city of St. Louis and its board of public improve-
members of that board. It was contended that the
first proceeding operated as res judicata in the sec-
the validity of the same ordinances was in question.
ded that the questions involved were the same in both
refused to be bound by the former judgment, saying:
that the parties to the two suits in question are the
ondents were strangers to the first suit, and none of
ssary parties thereto, or privy to any party to that
it appear that the respondents, or any of them, par-
trial of that suit, or that they were in any way con-
management. Our conclusion is that the judgment in
t res judicata": State ex rel. National Subway Co. v.
Io. 551, 46 S. W. 981, 42 L. R. A. 113. While the con-
appears to be correct, the reasons given for it were
ible. The respondent in the first case was the street
the city and county of St. Louis, and the respondents
ıse were such city and county and its board of public
Therefore, the respondents in both suits represented
ıme interest, and had the judgment in the first pro-
their favor, it must have controlled the second, had
ntiff been the same in both. Such, however, was not
real party in interest in the first application was the
erground Service Company," and in the second ap-
lator "The National Subway Company." It was be-
tors were different and not in privity with each other
ent in the one proceeding could not control in the
because the respondents were different.

and Citizens.—As a public officer is rarely person-
in a proceeding brought by or against him, and it is
o inquire after a judgment has been rendered for or
ıom did he represent, the answer to this inquiry is
lling in determining who is bound by and may take
ıe judgment. He is often the mere representative of
al body whose officer he is, and if so, the judgment
ence of fraud or collusion, be conclusive for or against
other hand, the matters involved are of general in-
ic is, in turn, but the representative of its citizens

and taxpayers, who must, therefore, be bound by the judgment if against it, and may take advantage of the judgment if otherwise. If proceedings are brought, one against the board of supervisors of a county to obtain a writ testing the power of that board to pass a resolution declaring a specified tax to be abated and directing the county treasurer not to collect it, and the other against the county treasurer to obtain a writ of mandate to compel the collection of the tax, and in those proceedings it is finally determined that the tax is valid and that there was no authority of the board to abate it, and that the tax collector should not proceed with its collection, this decision is conclusive against any subsequent action brought by a tax collector of the county to enjoin the treasurer from proceeding with such collection. In so deciding, the court said: "There is no averment that the adjudication in those cases was collusive or fraudulent. Indeed, the record conclusively shows that counsel representing the board of supervisors and the treasurer resisted the actions with great zeal and pertinacity, and never abandoned the defense until the overruling of a petition for rehearing in this court. It cannot be denied that the former actions were brought to enforce the tax, the collection of which is now sought to be enjoined. The question at issue is identical with that determined in the other cases. It involved the validity of the tax, and the defense in the other actions was that the levy was illegal and void, and they ask that the treasurer be enjoined from doing what, by the final judgment in the other cases, he was commanded to do. The only difference is that the plaintiffs claim that there were other grounds for declaring the tax void than those adjudicated in the former actions. This can be of no more avail to the plaintiffs than it would be to the original parties. If the validity of this tax was determined without fraud or collusion, that determination is conclusive upon the parties and their privies. But it is claimed that the plaintiffs herein were not represented by the defendants in the former actions; that there was no privity between them; that the officers of the county were indifferent between the parties, and that their acts were as much in privity with one as the other. But the record shows that the officers refused to perform what was claimed to be a duty, and sought by a resolution to abate the tax. They acted adversely to the rights of the claimant of the fund, and in the interest of the taxpayer, and in his behalf denied the legality of the tax. It seems to us if we were to hold that there was no privity between the taxpayers and the officers who were made defendants in the other actions, the writs of mandamus and certiorari and the proceedings thereunder might as well be abolished, because if they may be annulled by a mere action by the party in interest, they are totally unavailing and determine no substantial right. It will not do to allow parties in interest to fight their legal battles

lders of a public officer, and then claim that the judg- binding upon them because they were not parties nor nan v. Faris, 53 Iowa, 498, 5 N. W. 621. These views edly approved in Sauls v. Freeman, 24 Fla. 209, 12 Am. 4 South. 525, and we cannot doubt their correctness g what was said in Price v. Givin, 144 Ind. 105, 43 N. e appeared that in Board of Commissioners v. Gwin, d. 562, 36 N. E. 237, 22 L. R. A. 402, the board of com- White county obtained against the sheriff, auditor and he county, and certain contractors a judgment enjoin- lition of an old courthouse and the construction of a ying on this adjudication, the plaintiff in the second as a taxpayer, sought an injunction against the sheriff tearing down the courthouse. On appeal, it was held e parties to the first judgment were bound by it, yet in the second action, not being a party to the first ld not successfully rely upon it: Price v. Givin, 144 . E. 5. The court seems to have overlooked the propo- a taxpayer the plaintiff was one of the real parties the former litigation and hence entitled to the benefit nt therein.

lers and Others.—If a proceeding against the officers ental body is to prevent their levying or collecting g some other proceeding necessary to raise money for paying outstanding bonds, or otherwise necessarily as- lity or existence of those bonds, the holders thereof arties in interest, and may, under some circumstances, r take advantage of the judgment ultimately rendered. ndholder applies for a writ of mandamus to compel urer to pay interest coupons on certain bonds, and a ts refusing the writ on the ground that the bonds are gment is conclusive against the same bondholder in a ion against the city, because it was the real party in former proceeding: Ransom v. City of Pierrie, 101 . C. A. 585. Such a judgment is conclusive against chasing during the pendency of the suit from a party otice thereof: Scotland County v. Hill, 112 U. S. 183, . 93, 28 L. ed. 692. But these decisions apply only to the suit and persons acquiring title from them dur- ncy of the litigation, with notice thereof, and by no any answer to the question whether bondholders not suit are represented by the officers who in their in- ed to sustain the validity of the bonds in the sense are parties in interest to a judgment declaring bonds d requiring payment thereof to be made, or proceed- en which must result in such payment. As to those

for a writ of mandate is in a state court. If, therefore, an office who has been at the instance of one person enjoined from doing a act may be compelled to do it at the instance of another, we see n reason why such officer may not voluntarily do that which he ma be compelled to do if the party in interest seeks his appropriat remedy. As to the suggestion that he should apply by petition i the suit in which the injunction issued and to which he is not a party, it may be answered that, if final judgment has been entered we are not aware of any authority for such a proceeding, and cer tainly it would appear strange if an independent suit should be en tertained to set aside or obtain relief from a judgment in a previou action to which the complainant was not a party expressly nor b operation of law.

CONTINENTAL INSURANCE COMPANY v. VALLAND INGHAM.

[116 Ky. 287, 76 S. W. 22.]

INSURANCE, FIRE—Adjustment of Loss.—If a fire insur ance policy provides that if the insurer and insured differ in esti mating the amount of the loss, appraisers shall be appointed to fi the amount, there must be a real difference between the partie before a demand for appraisers can be made. The fact that the in surer merely declines to pay the amount of loss fixed by an itemize account made by the insured is not such real difference between them (p. 222.)

INSURANCE, FIRE—Adjustment of Loss—Refusal to Submi to Arbitration.—If a fire insurance policy provides that if the insure and the insured differ as to the amount of the loss, appraisers shal be appointed to fix the amount, and that no suit shall be brought o the policy until its provisions shall have been complied with, th failure or refusal of the insured to submit the adjustment of th loss to appraisers, unless he has good cause therefor, is a good de fense to a suit on the policy. (p. 222.)

INSURANCE, FIRE—Adjustment of Loss—Submission to Ar bitration, Waiver of.—A provision in a fire insurance policy that i case of a difference between the insured and insurer as to the amoun of the loss, that question shall be submitted to appraisers, and tha no suit shall be commenced by the insured on the policy until h has complied with such provision is inserted wholly for the protec tion of the insurer, and if he attempts to enforce it oppressively, o in bad faith, he must be deemed to have waived the benefit of it (p. 223.)

INSURANCE, FIRE—Adjustment of Loss—Failure to Reques Arbitration.—If a person for whose benefit a clause is inserted in a insurance contract desires to take advantage of it, he must brin himself within its terms, else he will [illegible] be excused because th other party has likewise failed. [illegible] the insurer asks fo

he loss, before suit brought, if that is provided for ie failure to arbitrate is not a defense. (p. 224.)

NCE, FIRE—Adjustment of Loss—Arbitration.—If ands arbitration of the loss as provided for in the in good faith nominate a competent, disinterested bitrator, before it can defend upon the ground that failed to keep that part of his contract. (p. 224.)

NCE, FIRE—Adjustment of Loss—Waiver of Arbitra- er, once having waived the right to demand arbitra- under the terms of the policy, cannot require that spute be again submitted to arbitrators. (p. 224.)

J. S. Gaunt, F. C. Green and Barger & Hicks, ant.

Boots and W. S. Pryor, for the appellees.

R, J. Appellees effected an insurance for six ars with appellants, six fire insurance companies, of general merchandise at Wheatley, Kentucky. of the burning of an adjacent building, threaten- ntaining the insured goods, appellees removed the street and to a nearby lot. In the excitement, kless manner of handling by the crowd the goods amaged by being soiled and otherwise abused. re to recover the amount of the damage, laid at dollars. The principal defense is that the in- nd refused to submit the amount of their loss or bitration or appraisement, as required by the the policies are alike in this particular. Their is known as the "New York Standard Policy." question is as follows: "This company shall not nd the actual cash value of the property at the or damage occurs, and the loss or damage shall or estimated according to such actual [296] cash oper deduction for depreciation, however caused, o event exceed what it would then cost the insured eplace the same with material of like kind and ascertainment or estimate shall be made by the his company, or if they differ, then by appraisers provided, and the amount of loss or damage hus determined, the sum for which this company ant to this policy shall be payable sixty days after scertainment, estimate and satisfactory proof of been received by this company in accordance with this policy. . . . . In the [illegible]t of disagreement unt of the loss the same [illegible] as above provided,

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, J. Appellees effected an insurance for six rs with appellants, six fire insurance companies, of general merchandise at Wheatley, Kentucky. of the burning of an adjacent building, threaten- taining the insured goods, appellees removed the street and to a nearby lot. In the excitement, less manner of handling by the crowd the goods maged by being soiled and otherwise abused. e to recover the amount of the damage, laid at dollars. The principal defense is that the in- d refused to submit the amount of their loss or bitration or appraisement, as required by the the policies are alike in this particular. Their is known as the "New York Standard Policy." question is as follows: "This company shall not d the actual cash value of the property at the or damage occurs, and the loss or damage shall or estimated according to such actual [296] cash per deduction for depreciation, however caused, event exceed what it would then cost the insured eplace the same with material of like kind and ascertainment or estimate shall be made by the is company, or if they differ, then by appraisers provided, and the amount of loss or damage us determined, the sum for which this company ant to this policy shall be payable sixty days after certainment, estimate and satisfactory proof of een received by this company in accordance with this policy. . . . . In the event of disagreement nt of the loss the same shall, as above provided,

be ascertained by two competent and disinterested appraisers the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser selected by them and shall bear equally the expenses of the appraisal and umpire. . . . . And the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. . . . . No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements. . . . . This policy is made and accepted subject to the foregoing stipulations and conditions." The fire occurred on the night [297] of November 1st. The insurance companies were promptly notified of the loss, and sent adjusters. Failing to agree upon the amount of the loss, on December 7th following the insurers and the insured entered into an "agreement for submission to appraisers," the material part of which, so far as affects the question now in hand, is as follows: "This agreement made and entered into by and between Vallandingham & Gentry, of Wheatley, Kentucky, of the first part, and the insurance company or companies whose name or names are signed hereto, of the second part, each for itself and not jointly, witnesseth, that C. G. Boerner and T. J. Boyd shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of November 1, 1900, as specified below. Provided, that the said appraisers shall first select a competent and disinterested umpire, who shall act with them in matters of difference only. The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss. It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of sound value and loss and damage only to the property hereinafter described, and taken into consideration every article on schedule attached hereto, whether totally or partially destroyed, and is to be in settlement of the entire loss, and shall not determine, waive or invalidate

ht or rights of either party to this agreement."
elected by the insured, and Boyd by the insurers.
merchant living in a village some few miles from
yd was a merchant living at Columbus, Ohio.
s spent most of the day of December 7th in trying
an umpire, but failed. All names then proposed
ere rejected by the other. About 2 or 3 o'clock
on Boerner announced that they were unable to
mpire, and signed an indorsement to that effect
al agreement. Boyd did not sign it, but did not
nake further effort toward an agreement. Boyd
ter for the insurance companies left together.
after they had arrived at the railroad station some
eatley, Boyd wrote to Boerner, offering to reopen
Boerner responded some days later that he had
to do with it, and that the insured had opened
hich had been kept closed since the fire), and be-
e goods, and that it was, therefore, impossible to
isal. Later Boyd offered to Boerner to accept as
the persons whom Boerner had offered at the
Boerner peremptorily declined to act further.
vrote, in answers to letters from the insured in-
oof of the loss and itemized statements thereof,
Boyd and Boerner should continue to act as arbi-
ould complete the appraisal as provided in the
December 7th. This was refused by the insured.
ific objection was made or intimated as to the
nage claimed, or touching any item of it. The
used to pay, because of the failure to have the
e, and these suits followed.
ar that appellants were entitled to an arbitration
ntracts in this case. The policies provide that
loss or damage was to be fixed by the agreement
and only in event of a difference was there a
d an appraisal. The insured promptly furnished
ized statements, showing in detail the values
em, and the 299 amount of loss or damage as-
er the articles were fairly valued in their sound
a matter easily enough to be ascertained by those
the markets of such goods. It does not appear
s' adjuster ever expressed an opinion or made
nation as would warrant it, before his testimony
at could be made the basis of intelligent action

by the insured. A general proposition to pay so much in aggregate smacks more of a proposition to compromise than to compensate. Arbitrarily rejecting the insured's estim without an earnest intention and effort to make a settlem upon the basis first fixed in the policies, in order that ve tious delays and questionable diplomatic advantages might gained in the matter of arbitrators, to lessen the sum t should be paid for the actual loss, is contrary to both the let and the spirit of the contract. That the insurers merely clined to pay the sum fixed in the schedule and itemized counts of the insured is not a disagreement, or differing, contemplated by the contract, so as to authorize a demand appraisal. It should have been a real difference, based up the facts, which should have been candidly and fully submit for acceptance by the other side. However, in the preparat of this case the parties have treated it as one where the dif ence between the insured and the insurers had occurred.

Appellees insist that the agreement to submit to arbitrat is void. An agreement to submit a possible controversy to bitration, made before the controversy has arisen, if it invol the determination of the right of recovery, both as to law a facts, is void, because it tends to oust the courts of their ju diction, and substitutes a contract tribunal in the stead of one provided by law for the trial of lawsuits. But the cou have held with marked unanimity 300 that an agreement submit the determination of some fact involved in a cont versy to arbitrators, or to some third person as a referee, is an invalid provision; and, where the agreement makes award or finding a condition precedent to a right of action, is enforceable, in that the failure, without good excuse, to s mit the question as provided, is a good defense to a suit up the contract: Joyce on Insurance, sec. 3232 et seq.; May Insurance, 3d ed., sec. 493; Hamilton v. Liverpool etc. I Co., 136 U. S. 242, 10 Sup. Ct. Rep. 945, 34 L. ed. 419; Uni States v. Roberson, 9 Pet. 319, 9 L. ed. 142. The arbitrat clause in insurance policies issued upon personal property, lived up to in the spirit that justifies their encouragement law, is a serviceable method of settling the question of loss damage. While the facts are yet fresh, and the damaged ar cles are to be seen, it is reasonable to suppose that impartial m familiar with the character and value of such goods in th community, can, by personal inspection, and by the use of th judgments and experience, more nearly come to a true valu

number of men not on the scene, inexperienced in
ity in the business of valuing such articles, try-
the values upon the testimony often of biased or
r careless witnesses. This clause of the policy
wholly for the protection of the insurer. The
lowed and encouraged it as an inexpensive and
ck upon the danger of overvaluation and fraud
nsured property holders who have sustained loss
the insurer will not be permitted to misuse this
vely, or in bad faith. To prevent such, when the
uses it, it ought to be held a waiver by it of that

cord we find that the person selected by appel-
heir appraiser had served many times in that
, and as many as three times before for one of
This fact alone need not be inconsistent with
y. But his conduct throughout this transaction
that of an employé than of a disinterested person.
ought from such a remote point, at great expense,
o the insurers that he was willing, and even anx-
t, in serving their interests, as a partisan would;
nation of the injured goods affected his judgment
id the paid adjuster of the companies, fixing the
damage at six hundred dollars, when all the other
y of them apparently disinterested and equally
d it at four thousand dollars; that he was di-
unseled with by appellants' adjuster, and sub-
the correspondence and other information gained
e attempt to arbitrate the loss—all convince us
on did not have the qualification implied in the
is, a discreet, disinterested, impartial man. This
tly known to the insurers or to their adjuster hav-
ment in charge. That an improper advantage
them in making this selection is equally evident,
pt the judgment and opinion of every other wit-
cord, except these two representatives of appel-
ng the amount of the damage. The evidence of
damage is convincing. An adjuster may be, and
ore competent than the ordinary merchant, and
nest, in fixing such valuations. But the great
of the evidence in this case seems to be against
ixed by appellants' adjuster.

We may say in passing that the arbitrator selected by ap
lees seems to have been equally as partisan as the ot
302 But, if a person for whose benefit a clause in a contrac
inserted would have the advantage of it, he must bring him
within its terms, and will not be excused because the other p
has likewise failed. Unless the insurer asks for the arbitra
or appraisal before suit brought, the failure to appraise is
a defense: Sun Mutual Ins. Co. v. Crist, 19 Ky. Law Rep.
39 S. W. 837 Bergman & Co. v. Commercial Union Ins.
12 Ky. Law Rep. 942; Chenowith v. Phoenix Ins. Co., 12
Law Rep. 232; Scottish Union and National Ins. Co. v. Str
24 Ky. Law Rep. 958, 70 S. W. 274. And when the insu
demands the appraisal, it must in good faith nominate a c
petent, disinterested person as appraiser, before it can def
upon the ground that the insured has failed to keep that p
of his contract: Chapman v. Rockford Ins. Co., 89 Wis. 572,
N. W. 422, 28 L. R. A. 405; Brock v. Dwelling-house Ins.
102 Mich. 583, 47 Am. St. Rep. 562, 61 N. W. 67, 26 L. R.
623. Having once waived the appraisal by its conduct,
insurer cannot require that the matter in dispute be again s
mitted to arbitrators. It was, therefore, within the legal ri
of appellees to decline to renew the arbitration at the ha
of Boyd and another, or any other appraisers: McCullough
Phoenix Ins. Co., 113 Mo. 606, 21 S. W. 207; Chapman
Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 4
Uhrig v. Williamsburgh Fire Ins. Co., 101 N. Y. 362, 4 N.
745.

The judgment of the circuit court was in conformity to th
views, and is, consequently, affirmed.

Petition for rehearing by appellant overruled.

Arbitration may, perhaps, be made a condition precedent to a r
of action on an insurance policy: Fisher v. Merchants Ins. Co.
Me. 486, 85 Am. St. Rep. 428, and cases cited in the cross-refer
note thereto. The insurance company, however, may, by bad fa
lose its right to insist upon an arbitration: Western Assur. Co
Hall, 120 Ala. 547, 74 Am. St. Rep. 48; Stephens v. Union As
Soc., 16 Utah, 22, 67 Am. St. Rep. 595; Brock v. Dwelling-house
Co., 102 Mich. 583, 47 Am. St. Rep. 562; Christianson v. Norw
Union Fire Ins. Soc., 84 Minn. 526, 87 Am. St. Rep. 379. An ag
ment for arbitration in an insurance policy is declared unenforceab
as tending to oust the courts of jurisdiction, in Hartford Fire
Co. v. Hon, 66 Neb. 555, 103 Am. St. Rep. 725, 92 N. W. 746.

WURTH v. CITY OF PADUCAH.

[116 Ky. 403, 76 S. W. 143.]

PAL BONDS—Limitation of Action on.—If a munici-
de payable at a certain time and place upon presen-
ute of limitations begins to run against it from ma-
h there is no presentation or demand for payment.

PAL BONDS—Limitation of Action on—Pleading.—
pon the original promise of a city to pay its bonds,
ich fails to allege the recognition by the city of the
h bonds and its promise to pay them, made before
statute of limitations attached and within the statu-
d at a time when it was legally bound to pay them,
o take the case out of the bar of the statute of limi-
7.)

PAL BONDS—Limitation of Action on.—The officers
ot, without legislative authority, extend the liability
its indebtedness on bonds beyond the express terms
to remove the bar of the statute of limitations. (p.

PAL BONDS—Limitations of Action on.—The Levy
of a Tax by a city to pay its bonds do not extend the
tion in which a suit may be maintained thereon. (p.

PAL BONDS—Limitation of Action on.—The Levy
of a Tax by a city to pay its bonds do not constitute
ted a trust fund for the payment of the bonds, if suit
ed by limitation. (p. 228.)

, for the appellant.

en, for the appellee.

HAM, C. J. The appellant, August Wurth,
uit against the city of Paducah to recover on five
city, and the coupons attached thereto, which he
issued on the thirteenth day of November, 1868.
g is a specimen of each of the bonds, with the
t they do not mature on the same day, but each
matured more than seventeen years before the in-
is suit:

406 "Bond No. 16.
o. 16. The United States of America.
000.00. State of Kentucky. $1,000.00.
w Orleans and Ohio Railroad Company.
"Bond of the City of Paducah.

of Paducah, State of Kentucky, acknowledges
d to the New Orleans and Ohio Railroad Com-

pany in the sum of one thousand dollars, for value receive negotiable and payable to bearer, at the National Bank o the State of New York, in the City of New York, for whic sum of one thousand dollars, the said City of Paducah, i pursuance of law, issues this Bond, signed by the Mayor an Clerk of the said City of Paducah, and does hereby promis and agree to pay the said sum of one thousand dollars on th first day of January, 1871, upon the presentation and deliver of this bond at the above-named place of payment; also th said City of Paducah promises and agrees to pay interest o said sum of one thousand dollars, at the rate of 6 per cen per annum, payable at said bank on the 1st day of January an July in each and every year ensuing the date hereof, until th principal debt is paid, upon the delivery of the coupons here unto attached, signed by the Clerk of said City. This Bon is one of a series of thirty-eight, of like date and amount, an issued by said City of Paducah to said New Orleans and Ohi Railroad Company, in payment of a bond of like amount is sued by the City of Paducah, and due and payable.

"[Seal.] Witness the seal of the City of Paducah, an the signatures of the Mayor and Clerk of said City, this thir teenth day of November, one thousand eight hundred and sixty eight.

"J. W. SAUNER,
"Mayor of Paducah.
"W. M. GREENWOOD,
"Clerk of Paducah."

407 The city answered, denying liability for various reasons and pleaded the lapse of time and statute of limitation in ba of recovery. To which appellant replied, denying all the affirm ative allegations in the answer relied on to escape liability, an in the second paragraph of his reply alleged that the bonds an coupons sued on were commercial paper, and stipulate that the do not become due and payable until demand, presentation an delivery thereof at the National Bank of the state of New York in the city of New York, and that no cause of action accrue thereon until these conditions were complied with; that on th 13th of March, 1900, demand was made for the first time a the bank for payment, which was refused; that within fifteen years before the institution of this suit the defendant, the city of Paducah, by its mayor and council, had admitted and ac knowledged the liability of the city for the bonds and coupon

had agreed and promised to pay same. The city
terposed a general demurrer to each paragraph of
ch was sustained. Plaintiff thereupon offered to
ed reply, in which he alleged that the city of
levied and collected a tax sufficient to pay the
ipons sued on, and held the money in trust for
and that it had no right or power to appropriate
collected to any other purpose. The trial court
mit this amended reply to be filed, and dismissed
nd plaintiff has appealed.

us that neither of the defenses relied on is suffi-
the running of the statute. We will consider
y. The contention that no "cause of action" ac-
e bonds until after presentation and demand for
e bank in the city of New York is the first one.
ovide, in terms, that [408] they will be paid on a
ipon their presentation and delivery at the place
med in the face of the bond. It is a well-settled
at, if an instrument be payable on demand at a
and place, the statute begins to run at its matur-
nt could be immediately demanded, and, if re-
ought. But if payable at a certain time after
ter notice, actual demand must be made, or no-
order to fix the period of maturity when the stat-
run: See 2 Daniel on Negotiable Instruments,
v. Warner, 47 N. Y. 519, 7 Am. Rep. 478; Her-
rton, 41 N. Y. 581, 1 Am. Rep. 461. Appellant
at the operation of the statute by a mere failure
comply with the terms of the bonds as to presen-
nand for payment.

l paragraph of plaintiff's reply, he states "that
aducah by its acts and proceedings has all the
issual of the bonds and coupons sued on herein
ne as its bonds and indebtedness, and within fif-
: past before the beginning of this suit the city
y its mayor and council, has admitted and ac-
efendant's indebtedness for said bonds and cou-
and agreed and promised to pay same." The
his paragraph are equally ineffectual to take the
e statute—first, because the suit is upon the or-
of the city to pay the bonds, and it is not alleged
nition by the city, and the promise to pay them,

was made before the bar, and within the statutory period, and at a time when it was legally bound to pay them. But this defense would be unavailing, even if the averments of the replr had been technically within the rule, for the reason that the mayor and council of a municipal corporation have no power or authority to [409] extend the liability of the city for its indebtedness beyond the express terms of the instrument evidencing such liability, without legislative authority, express or implied. In Clark v. Des Moines, 19 Iowa, 199, 87 Am. Dec. 428, Judge Dillon states the law on this subject with great force and perspicuity in these words: "The general principle of law is well known and definitely settled that the agents, officers or even city council, of a municipal corporation, cannot bind the corporation when they transcend their lawful and legitimate powers. This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are mere public agents of the corporators. Their duties and powers are prescribed by statute. Everyone, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of ultra vires; that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority." See, also, Dillon on Municipal Corporations, fourth edition, 291, and Smith's Modern Law of Municipal Corporations, sections 186, 246, 247. Nor does the fact that the city of Paducah may have levied and collected a tax for the purpose of meeting the bonds and coupons sued on have the effect to extend in any wise the statutory period of [410] limitation in which a suit could be maintained upon the bonds. The city might very properly, during the life of the bonds, have made provision for their payment upon presentation and demand as stipulated in the bond. But this fund did not become a trust fund for the payment of the obligations from which the city had been exonerated by the lapse of time and the statute of limitations. We are therefore

hat the chancellor properly sustained a demurrer nd, upon appellant's failure to plead, dismissed

firmed.

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ty of a Demand to Start the Running of the statute ee New England Fire Ins. Co. v. Haynes, 71 Vt. Rep. 771; Laidley v. Smith, 32 W. Va. 387, 25 Am. raft v. Thomas, 123 Ind. 513, 18 Am. St. Rep. 345; er, 81 Cal. 631, 15 Am. St. Rep. 88; Tobin v. Mc-Oak. 257, 91 Am. St. Rep. 694. Though a demand perfect a cause of action, a party interested cannot, ne the running of the statute by his failure to make es v. Glide, 117 Cal. 1, 59 Am. St. Rep. 153. See, xton, 105 Mo. 486, 24 Am. St. Rep. 403; Winchester ., 100 Ky. 531, 66 Am. St. Rep. 356.

l of the Bar of the Statute of Limitations against a ation by an acknowledgment or promise made by s, see Houston v. Jankowskie, 76 Tex. 368, 18 Am. e levy and collection of taxes by a city to meet create a sinking fund is not an acknowledgment mise to pay any particular bond or issue of bonds ir face are barred by the limitation: Houston v. Tex. 368, 18 Am. St. Rep. 57. On acknowledgments s, generally, to suspend the running or remove the te of limitations, see the monographic note to War-, 102 Am. St. Rep. 751-777.

D TELEGRAPH AND TELEPHONE COMPANY v. MARTIN.

Ky. 554, 76 S. W. 394, 77 S. W. 718.]

NE COMPANIES—Negligent Maintenance of Wires see.—If a bare licensee goes under the porch of a n shelter from a storm, and while there is killed by ted to his body by a wire negligently maintained ompany over the roof of such building, the company his death. It owed him no duty to properly main- (pp. 232, 233.)

erry and Humphrey, Burnett & Humphrey, for

and W. G. Warren, for the appellee.

N, J. Appellee filed this action to recover of e death of his intestate, Walter Martin, a young years old, charging that his death was caused

by the negligence of appellant. He recovered judgment for five thousand dollars. The only question we deem it necessary to consider on the appeal is whether the facts shown on the trial warranted a recovery. These facts are as follows: On May 18, 1901, a dark cloud came up at Roland, Kentucky. The deceased, in company [557] with another young man and some boys, took refuge from the rain under the porch of a store building. Part of the boys entered the store, but the deceased remained on the porch, sitting on a goods box, with his back against the grating over the window. This grating ran up near the roof, and consisted of metal rods. A telephone wire belonging to appellant, as found by the jury, ran over the roof of this porch and within two or three inches of it. The roof was of metal and wet. Lightning struck one of the telephone poles about six hundred yards from the porch, and, after shattering that pole and several on either side of it, was conducted by the wire to the porch, where it left the wire for the iron roof, or part of it did, and passed from the iron roof to the grating, and thence through the body of the deceased to the ground, killing him instantly. There was sufficient evidence of negligence in the way the wire was attached to the house to go to the jury if the defendant owed any duty to the deceased, or if his death was the proximate result of its negligence. The wire had been placed thus on the building in the year 1899, and there had been some complaint then by the owner about it, and there had been a promise to remove it by the person who put it there; and there was some complaint also in the year 1900, but for some months before the injury nothing appears to have been said about it. Appellant did not put the wire there, but found it on the house when it took charge, but there was evidence of notice by the owner that the wire should be removed after this. There was some conflict in the evidence, but this is as strong a statement of the facts as the proof for appellee warrants. In Pittsburg etc. R. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751, the deceased, being out of employment, went to the passenger station of the railway for pastime and a place of safety during a storm. The house was negligently constructed, and by reason of this [558] negligence fell during the storm, killing the deceased. The action was brought to recover for his death. The court, after pointing out that actionable negligence exists only where he whose act causes the injury owes to the injured party a duty, and referring to many cases applying this principal, held that the plaintiff could not

id: "It is doubtless true that a railroad com-
ıg station-houses and opening them to the pub-
icenses all persons to enter. But it is equally
license is revocable at the pleasure of the com-
persons who are not there on business connected
or with its servants or agents. An implied li-
depot creates no additional duty upon the part
as respects the safety of the building entered.
is to make that lawful which, without it, would
Wood v. Leadbitter, 13 Mees. & W. 838. It
relinquishment of the right to treat him who
a trespasser." In Lary v. Cleveland etc. R. R.
3, 41 Am. Rep. 572, some boys took refuge in
ıouse in a storm, and one of them was injured
f part of the house. The court, after showing
d company owed him no duty, applied the prin-
e there is no duty to the person injured, there
le negligence. In Severy v. Nickerson, 120
ım. Rep. 514, a longshoreman, after loading ice
ent on it after finishing his work merely to
osity, and while there fell down an open hatch-
left open, and broke his leg. It was held that
e vessel owed him no duty, and that he assumed
the place. The court said: "The distinction
ween the obligation which is due by the owners
mere licensee, who enters thereon without any
nducement, and 559 one who enters upon law-
the invitation, either expressed or implied, of
is well settled. The former enters at his own
ecisions are in accord with the entire current
th English and American. Thus in 1 Thomp-
ıce, section 946, it is said: "As a general rule,
rivate grounds is under no obligation to keep
ondition for the benefit of trespassers, intruders,
nsees, or others who come upon them not by an
ess or implied, but for their own purpose, or to
riosity, however innocent or laudable their pur-
In sections 947-952 many illustrations of this
iven. To same effect, see note to Godley v.
ı. Dec. 736; also note to Zoebisch v. Tarbell, 87
Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16
3terger v. Van Sicklen, 132 N. Y. 499, 28 Am.
) N. E. 987, 16 L. R. A. 640. If it be conceded

that the deceased was not technically a trespasser, but a licensee, still he was a bare licensee. He had no business at the store. He went under the porch to get out of the rain, and remained there entirely for his own convenience. Under the above authorities, the owner of the property was under no liability to him to keep it safe. If the telephone company had owned both the building and the wire, it would not have been under any responsibility to the deceased for his injury, although he was under its porch by its implied consent, as he was there as a bare licensee, for his own convenience. If the telephone company would not be responsible if it owned both the wire and the building, it is certainly under no greater responsibility when it owned only the wire. If it had put its own wire negligently on its own building, and thus endangered its being struck by lightning, it would be responsible to those it invited to the building in a dangerous condition, but it [560] would not be responsible to those merely using it for their own convenience as a shelter in a time of storm. When it put its wire negligently on another person's building, and was negligent in securing it, it violated its duty to him, but it violated no duty to those to whom neither he nor it were under any obligation. We therefore conclude, for the reasons stated, the plaintiff made out no cause of action against appellant. This conclusion makes it unnecessary for us to consider the other questions discussed.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

ON PETITION FOR REHEARING.

HOBSON, J. The distinguished counsel for appellee concedes in the petition for rehearing that the facts of the case are fairly stated in the opinion. He also concedes the soundness of the authorities cited, and that if the telephone company had owned both the house and the wire it would not be responsible for the death of the intestate. But he insists that it does not follow that it is not responsible when it owned only the wire, and allowed it to remain on the building after it was requested by the owner of the building to remove it. No authority is cited by the learned counsel sustaining his contention, and he seems to misapprehend the legal principle upon which the opinion rests. This is that there can be no negligence where there is no legal duty. In 1 Shearman & Redfield on Negligence, section 8, in defining negligence, it is said: "The first element of our definition is a duty. If there is no duty, there can be no

If the defendant owes a duty, but does not owe
ntiff, the action will not lie. And there can be
any act which one has no legal right to do. The
must state and prove facts sufficient to show what
nd that the defendant owes it to him." See, also,
, Cooley on Torts, 659, 660. In Bishop on Non-
section 446, the rule is thus stated: "To sustain
negligence, the plaintiff must have suffered a
whereof he is entitled to complain. Therefore,
the defendant's negligence, if it was committed
ing any duty which he owed either directly to the
the public in a matter whereof he had the right
lf, as explained in the earlier chapters of this vol-
nothing which the law will redress." He who
ency which is of itself dangerous to human life
for injuries therefrom not caused by extraordi-
occurrences or the interposition of strangers:
nchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton
Mass. 143, 8 Am. Rep. 298. But as to things
of themselves essentially instruments of danger
fferent, and for them the negligent party is not
strangers: Loop v. Litchfield, 42 N. Y. 351, 1
; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638;
British etc. Ry. Co., 8 El. & B. 1035. If the
pany had used over its wires a current of elec-
was of itself dangerous to life, a different ques-
presented; but the electricity which killed the in-
from the clouds, and was the act of God. The
the telephone company used in its business was
owed the intestate no duty to furnish him a safe
he rain. When he used the porch as a shelter,
e found it. The wire of the telephone company
of itself an instrumentality dangerous to human
was no duty violated to the [562] public in a mat-
e intestate had the right to avail himself. Sec-
Thompson on Negligence has reference to defects
hich are in themselves dangerous. Section 807
liability of the company owning the wire to the
house.
rruled.

Case is cited in the monographic note to Hebert v.
ee etc. Co., 100 Am. St. Rep. 538, on the duty and
trie corporations.

COMMONWEALTH v. YOUNG MEN'S CHRISTIAN ASSOCIATION.

[116 Ky. 711, 76 S. W. 522.]

TAXATION—Exemptions for Religious Purposes.—A "Young Men's Christian Association," organized for the promotion of religion, morality and intellectual and social improvement, and to endeavor to bring young men under moral and religious influences, owning a building in which religious services and teachings are had every Sunday, conducts a place of religious worship and its building and property, so used, are within the meaning of a constitutional provision exempting from taxation all property used as a place for religious worship. (p. 237.)

TAXATION—Exemptions—Public Charity.—A "Young Men's Christian Association," organized for the purpose of bringing young men under moral and religious influences, of securing their attendance at some place of worship, and of aiding them in selecting suitable boarding-houses and employment, owning a building and actually engaged in such work, besides furnishing instruction, keeping open libraries, and performing other charitable work for its members, is an institution of purely public charity, within the meaning of a constitutional provision, exempting the property of such institutions from taxation. This is true, although some part of the expense of maintaining the institution is required to be paid by members who enjoy all its privileges, the membership not conferring any property right. (p. 239.)

H. L. Stone and J. B. Clark, for the appellants.

Helm & Bruce, for the appellee.

716 O'REAR, J. These two appeals involve a common question, namely, the liability of the property of appellee to taxation. In each case, the appellee owns a large and valuable building, used in part for other purposes than directly by the association. Rooms in the building are rented to raise revenue to help to maintain the institutions. A considerable part of the buildings are constantly used by the associations for their meetings and other work. In each case, also, the appellee owns a vacant lot and other property, pending its sale. The lots were taken in payment of donations to the institutions. Appellee's claim of nonliability to taxation depends upon the character of the institutions.

All property must share in bearing the burden of government, except such as by the constitution is expressly exempt. Section 170 of that instrument is as follows: "There shall be exempt from taxation public property used for public purposes,

used for religious worship, with the grounds to and used, and appurtenant to the house of xceeding one-half acre in cities [717] or towns, and two acres in the country; places of burial not te or corporate profit, institutions of purely pub- d institutions of education not used or employed y person or corporation, and the income of which ely to the cause of education; public libraries, nts and the income of such property as is used their maintenance; all parsonages or residences religious society, and occupied as a home, and urpose, by the minister of any religion, with not half acre of ground in towns and cities and two nd in the country appurtenant thereto." Ap- to come within the classes of exempted objects on three grounds: 1. That their buildings are used for religious worship, and do not exceed f ground; 2. That they are institutions of purely ; and 3. That they are institutions of education, mployed for gain by any person or corporation, e of which is devoted solely to the cause of ed- circuit courts of Daviess and Jefferson counties the claims of exemption.

legislature granting the charter to appellee, the ociation, approved April 3, 1878 (2 Acts 1878, p. states the purposes of the association thus: tain persons have associated themselves together Men's Christian Association, for the promotion orality and intellectual and social improvement; promotion of these ends desire a charter of in- nerefore, be it enacted," etc.

ution adopted by the association, in which is set oses, declares:

It shall be the object of the association to seek men and endeavor to bring them under moral influences; to secure their attendance at some ip; to introduce them to the members and privi- association; to aid them in selecting suitable es and employment, and by every possible means nem with Christian influences.

embers shall exert themselves to interest the hich they may belong in the object and welfare

of the association, and use all proper means to increase its u
fulness."

The objects and purposes of the Owensboro Association
substantially the same.

So much for the apparent nature of the association.
tually, on every Sunday afternoon there is held in their bu
ing a religious service for the worship of God. As a witn
describes these, they are "much like preaching service, thou
not so formal." There are singing of hymns, reading of Sc
tures, and expounding of the same, prayer, and generally
invitation and exhortation to lead a Christian life. In addit
to these religious Sunday services, which may be said to
respond with the preaching services of the churches, there
regularly taught Bible classes in the association buildings, wh
classes correspond very nearly to the Sunday-school work d
by the churches. Other religious studies are also conduc
All of these services are strictly religious services, and are
tually held in the association buildings. In addition to th
other work of a religious nature is done by the association
side of the building. Its religious work is its main work.
secretary receives a salary. He is the only one of the asso
tion who receives any money compensation from it.
duties are quite similar to those of a pastor of a church.

There was nothing, perhaps, in all that moved the set
ment of this country, and the establishment of its forms
719 government, more dominant than the religious idea. F
the earliest settlements, through every form of social comp
and by universal consent, ingrafted now either upon the
stitutions of the states or upon their statutes, is the idea
the public well-being justifies the most liberal encouragem
of religious teachings and practices; and to that end, alw
buildings used for religious worship have been exempted f
taxation. Religious societies are deemed to be public bene
tors. Their teachings and moral discipline among their m
bers are probably of as much value to society, in keeping
peace and preserving the rights of property, as the most el
rate and expensive police system without such influen
Hence they are regarded with favor. No one church or sec
regarded by the law as above any other. Nor does the man
of worship or the method of teaching or the creed affect
public policy. It is therefore not material that the institu
claiming the benefit of the constitutional exemption is with
an ordained preacher, or that its methods involve a depar

tomary modes of worship. If the worship is
mending itself to the consciences of its votaries,
e pale of the law's favor. We have no hesitancy
hat appellees, in the use of their buildings as
used for religious worship, are exempted from
on, as being clearly within the letter and intent
of our constitution. But if the society owns
, not actually used as a place for religious wor-
wns property so used, but in excess of the quan-
by that clause of the constitution which has been
some part of its buildings is used distinctly for
, such excess would be liable to taxation as other
out regard to its ownership, unless by some other
e constitution it [720] was exempt, which brings
appellees' claim that they are institutions of
charity.

its broad sense, should abound in every institu-
g even the rigor of the law, and meliorating the
ns of life. It is announced by Divine authority
by the common consent of all enlightened people
chief of human virtues. When property is em-
unselfish exercise on behalf of the public, where
rdens of society, and in a measure thereby dis-
which the public, on its conscience, owes to un-
anity, and is unrestricted save by the limitation
charity may be said to be a purely public one.
ies are public blessings, and the commonwealth
n giving force and effect to them," this court de-
nbers v. Baptist Educational Soc., 1 B. Mon. 215.
at part of the religious work done by appellees,
denominated devotional, they undertake to bring
ligious, moral and intellectual influences of the
young men, and, for that matter, old men, too,
ment, improvement and protection from evil in-
consequences. It is not so much the giving of
id of the mendicant. The endeavor is to reach
young men before they need alms, and before they
beggary, and, by training the minds, and teach-
to use and preserve their bodies, and how to
l honest lives, to save them from the lower grades
, so familiar in the utter helplessness of abject
lisease and want. This is accomplished by the
keeping open attractive quarters, where libraries

of useful books, current magazines and newspapers, innocen games of amusement, a gymnasium for the exercise and develop ment of the body, and the night schools, affording [721] addi tional opportunities to such as have not had sufficient advan tages in education, are all accessible to whomsoever will avai himself of them, without regard to creed or nationality. List of decent boarding-houses are kept, to which strangers are di rected. Proper acquaintances and associations are formed, an useful and moral instruction imparted. In other words, the help the helpless, would keep the innocent innocent, and en deavor by placing clean ideals and experiences before the yout to have them adopt them in their lives. They aid the unedu cated to a limited but practical education. This is all don "for the love of God and for the love of our neighbor, in th catholic and universal sense, free from the stain of anythin that is personal, private or selfish"; and it is, therefore, as sai by this court in Ford v. Ford's Exr., 91 Ky. 756, 13 Ky. La Rep. 183, 16 S. W. 451, a charity.

But it is argued that however benevolent the purposes an work of these institutions, they are limited to their own mem bers, and consequently come under the head of private, instea of public, charities. The institutions have memberships, fo which a nominal fee is exacted. Many, if not most, of thei privileges, are restricted to their own members. But the mem bers have no property right, or at most but a qualified an temporary one, in the buildings or funds of the association They receive no profits or dividends. Certificates of member ship are not transferable, and have no money value. The rela tion of the members is similar to that of members of churches— a membership entailing a pecuniary obligation and probabl an insignia of worthiness and good standing for the time being The fund by which the lots were acquired and the building erected and furnished was, in the main, contributed by char itably disposed persons, who [722] have absolutely no pecuniar interest in or control of the institutions. They are donated fo the perpetual enjoyment of all who shall avail themselves o the privileges. The part contributed by membership fees i by far the smaller part of the means necessary to maintain th association's work. Any man or youth of acceptable mora standing is eligible for membership. Many of the privilege of the institutions are, however, absolutely free to all the pub lic. But the fact that some part of the expense in maintainin the institution is required to be paid by those who enjoy all it

not change its character as a public charity. this court in Trustees of Kentucky Female Or- City of Louisville, 100 Ky, 470, 19 Ky. Law S. W. 921, 40 L. R. A. 119, that the fact that was exacted from some of those who were bene- ool did not detract from its character as an in- rely public charity. That regulation merely ity partly self-sustaining. It was also held in he cases decided at the same time, that the fact ted number of the public were benefited, on their tarian trustees, did not deprive it of its char- purely public charity. It is plain that the constitution could not have meant that only ns should be included in their exemption which en to all the public, for there are none such. er, regulation and selection are necessary in dis- harities; and requirements not unreasonable in s, although they limit as of necessity they must, be benefited to the accommodation of the means t at all incompatible with the general character tions.

utions are ones of purely public charity—which ducational features, not separately considered ason—all their property is exempt from taxation. the court in the course of the opinion in Trus- ky Female Orphan School v. City of Louisiana, 9 Ky. Law Rep. 1916, 36 S. W. 925, 40 L. R. A. e whole, it would seem that when the statute institution' from taxation, and no qualifying showing or tending to show that only the prop- the institution, or 'connected' with the institu- xempt, then the associated entity—the corporate estate as an entirety, is embraced by the word The cases of Newport v. Masonic Temple Assn., 1 Ky. Law Rep. 1785, 56 S. W. 405, 49 L. R. A. nd Orphans' Home of the Odd Fellows of Ken- orth, 112 Ky. 200, 23 Ky. Law Rep. 1505, 65 Commonwealth v. Lexington Cemetery Co., 114 Ky. Law Rep. 924, 70 S. W. 280, are cited by ndicating a different construction from that here 70 of the constitution. In addition to the fact s do not purport to overrule the comparatively roughly considered case of Trustees of Kentucky

Female Orphan School v. City of Louisville, 100 Ky. 486, 1
Ky. Law Rep. 1916, 36 S. W. 925, 40 L. R. A. 119, and wer
therefore not considered by the court as being in conflict there
with, there is this distinction between them, on the one side
and the Orphan school case and these cases on the other: Th
Masonic Temple case and the Odd Fellows' Widows' and Or
phans' Home case were each private charities, pure and simpl
and so held by the court, because they were exclusively for th
benefit of certain designated beneficiaries—those dependen
upon the creator of the charities, or for the benefit of the pe
sons claiming the exemption, as in the case of the Mason
They were held to have certain secret rites, ceremonies and di
tinctions, which might be deemed to have a peculiar value. A
least, they were intended to, and did, exclude all the [724] pul
lic but themselves from their enjoyment. They owned the
property, and used it exclusively for their own personal enjo
ment and entertainment, as a social club or other similar a
sociation might. Their charitable contributions were more i
the nature of a mutual insurance or protective arrangeme
by which they insured themselves, or the dependent members
their families, against want in certain contingencies. The
charitable work, if any, outside of that bestowed on themselv
and their own families, was incidental only, and not the obje
tive purpose of the institutions. The Cemetery company ca
was decided upon the express language of the constitution
which exempted only the places of burial or graveyards, a
not investments devoted to the maintenance of burial place
Two cases from other courts denying the exemption to Your
Men's Christian Associations have been cited by counsel f
appellants, viz., Auburn v. Young Men's Christian Assn., 8
Me. 244, 29 Atl. 992; and the other, State v. Patterson (N. J.
39 Atl. 655. The first of these cases was made to turn up
the peculiar phraseology of the Maine statute (Laws 1889,
242, c. 274), to wit: "Except that so much of the real est
of such corporations as is not occupied by them for their o
purposes, shall be taxed in the municipality in which it
situated." All that part of the associations' buildings actua
occupied by them was held to be exempt. The New Jersey c
discusses only the "charitable feature" of the question.
held that the word "charity," in their statute (3 Gen. Sta
p. 3320), was not used in its broad sense, but, on the contra
was solely in the sense of "aid to the needy." This constr

d is not in harmony with that uniformly placed
s court.
ts of the circuit courts are each affirmed.

Burnam dissents.

---

a Young Men's Christian Association is held not ex-
ion in the following cases: People v. Young Men's
157 Ill. 403, 41 N. E. 557; Auburn v. Young Men's
6 Me. 244, 29 Atl. 992; Young Men's Christian Assn.
3 N. Y. 187, 21 N. E. 86.

T v. CITY OF WEST COVINGTON.

[116 Ky. 850, 76 S. W. 1089.]

**AL CORPORATIONS—Public Schools—Negligent
choolhouse.**—A municipal corporation owning a build-
its, in the possession and under the control of school
sed for public school purposes, is not liable for per-
stained by negligence in the maintenance of such
sed for public school purposes. (p. 244.)

and W. McD. Shaw, for the appellant.

an, for the appellee.

ER, J. West Covington is a city of the fifth
power to acquire and hold real estate. It owned
lding situated within its corporate limits. The
of action may be best stated by quoting from
follows: "That said defendant permits said
used as a public school, which is attended by
residents of said city; said building is situated
d ground fronting on Main street, and is about
back from the eastern boundary of said lot;
described realty is about four or five feet above
ain street and the sidewalk abutting said prop-
lefendant had, long previous to the times herein
ted and constructed a stone wall on the eastern
perty and adjoining the said sidewalk; that said
about four or five feet high, and the top of said
and is on a level with the said above-described
pace between the building and said stone wall
rick, and the school children all used this space

as a passage to the back yard and a [852] playground whic
fendant and its officers and servants well knew, or ought to
known; that the said eastern boundary of said property wa
had been for many months and for a long time in a dang
condition in not having a fence or railing or some barrier
said eastern boundary, as defendant well knew, and that i
the duty of said defendant to place along the eastern bou
of said property a fence or railing or barrier to prevent
dren or persons from falling or being thrown over and
the sidewalk below, and to thus protect children and pe
using or passing over said property; that said defendan
officers and agents, did willfully, negligently and carelessl
to construct and erect any fence or railing or barrier o
top of said stone wall, or on any portion of the eastern li
said property, to prevent children or others from falling
same and upon the sidewalk beneath, and said defendan
officers and agents, did willfully, negligently and care
permit said stone wall and the eastern part of said rea
remain for many months and years without any fence or
ing or barriers which would prevent children and others
falling over same and upon the sidewalk below, and sai
fendant, its officers and agents and servants, well knew, or
to have known, of the dangerous condition of the said e
boundary of said property, and knew, or ought to have k
that no fence or railing or barrier was there at the time
injuries herein complained of or had ever been there; th
or about the fourth day of October, 1901, plaintiff, Rosa
Ernst, was attending school at said building, as were num
other children, and was rightfully on said property, and
ing between said building and said stone wall, and near
wall than the building; that while so standing, and wi
fault on her part or on the part of [853] her parents, sh
run upon and against and jostled by another child or othe
dren, and was violently thrown upon and over said stone
and upon the pavement below said stone wall, and her lef
was broken, fractured, and dislocated and injured at o
the elbow, and her right arm was badly bruised and inj
The property was in the possession of and in the control
common school district in the city of West Covington.
injured child was attending the public school, and sus
the injury in the manner described in the petition. The
tion is, Can the city of West Covington be held liable f
damages sustained?

egards it as her duty to establish and maintain
ublic education. When sums have been collected
ose they cannot be diverted to any other use or
it could be done, the system would be injured and
ffer incalculable injury. If someone is injured
construction of a public school building or the
of the grounds, no action can be maintained
istrict for such injury. The law provides no
such claims.

an & Redfield on Negligence, section 267, it is
ity of providing means of education, at the pub-
building and maintaining schoolhouses, employ-
etc., is purely public duty, in the discharge of
al body, as the state's representatives, is exempt
e liability for the faulty construction or want of
school building or the torts of its servants em-
."

City of Boston, 122 Mass. 344, 23 Am. Rep. 332,
that there could be no recovery, and stated the
ws: "This was an action of tort against the city
laintiff, who sued by his 854 next friend, offered
he trial, in May, 1874, he was of the age of
, and was a pupil attending school in Boston,
e of the public schools which the city was bound
and maintain; that this school was on the third
uilding in which it was kept; that the staircase
and the railing thereof so low as to be dangerous;
negligently constructed and maintained the build-
orized the public school to be kept therein; that
while going to school, and being in the exercise
ver the railing of the second flight of stairs, and
injured. The plaintiff also offered to prove that
nmittee of the city for a long time before the ac-
the building to be dangerous and unfit for the
public school, and had been notified by the
he school of the dangerous condition, and had
epair same, and had neglected to do so."

ourt in Sullivan v. City of Boston, 126 Mass. 542,
have said before, the place where the injury hap-
the schoolhouse yard or lot, and, even if the city
o be defective and dangerous, it is not liable there-

The same doctrine is recognized in Lane v. District Township of Woodbury, 25 Iowa, 462, 12 N. W. 478; Howard v. Worcester, 153 Mass. 426, 25 Am. St. Rep. 651, 27 N. E. 11, 12 L. R. A. 160; Ford v. Kendal, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607.

In Wixon v. Newport, 13 R. I. 554, 43 Am. Rep. 35, the court said: "This is an action brought against the city of Newport by the plaintiff, a minor, suing by her next friend, to recover damages which she suffered by being scalded and burned in one of the public schools of the city, [855] by the heating apparatus there used, which the declaration alleges was carelessly kept by the city in a defective, unsafe, and dangerous condition, without sufficient guarding and protection. . . . . If we understand the case aright, the ground of exemption from liability is not that the duty or service is compulsory, but that it is public, and that a municipal corporation in performing it is acting for the state or public in a matter in which it has no private or corporate interest."

Counsel for appellant concedes the law to be as stated, but claims that the city was not required by law to furnish the building for common school purposes; that the city had nothing to do with the maintaining of the public school; that it occupies the same position with reference to the house and lot as if the building had been used for other purposes. Although the city was not compelled to furnish the school trustees with the building for public school purposes, still it did so, and made that contribution to the public to aid in the promotion of education. The use of the building accomplished the same purpose as it would have accomplished had it been owned by the common school district. The building was not owned by the city for private or municipal uses, but for a public purpose. We are of the opinion that the doctrine of the cases cited should apply to the facts of this case.

The judgment is affirmed.

The Principal Case finds support in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Howard v. Worcester, 153 Mass. 426, 25 Am. St. Rep. 651; Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35. Compare, however, Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708; Buchanan v. Barre, 66 Vt. 129, 44 Am. St. Rep. 829.

YDWELL v. CITY OF LOUISVILLE.

[116 Ky. 885, 76 S. W. 1091.]

ION—Public Purpose—Sprinkling City Streets.—A city vy and collect a tax for street sprinkling purposes, tutional provision that taxes shall be levied and col- ic purposes only. (p. 247.)

IPAL CORPORATIONS—Taxation for Street Sprink- Contract.—A municipal corporation having power ollect a tax for street sprinkling purposes may con- ther to do the sprinkling and pay him therefor from g from such taxation. (p. 248.)

rrison, for the appellant.

e, city attorney, for the appellee.

ER, J. The appellants, who are citizens and Louisville, Kentucky (a city of the first class), s action for the purpose of enjoining the collec- sbursement of a tax of three cents on each one ars worth of taxable property for the purpose of e streets of the city. They claim the sprinkling is not a public purpose, and that, therefore, so ordinance as provides for the tax is unconstitu- id. This is the question involved in this litiga-

l of the constitution provides: "The General As- provide by law an annual tax, which, with other ll be sufficient to defray the estimated expenses nonwealth for each fiscal year. Taxes shall be llected for public purposes only. They shall be l all property subject to taxation within the ter- of the authority levying the tax; and all taxes d and collected by general laws." Section 181: Assembly shall not impose taxes for the purposes , city, town, or other municipal corporation, but ral laws, confer on the proper authorities thereof, he power to assess and collect such taxes." These comprise the constitutional provisions regulating hand. The charter provisions applicable to the s follows:

Each city shall raise a revenue from ad valorem l a poll tax and license fees, and to that end the cil of each city is hereby authorized and empow-

ered to provide each year, by ordinance, for the assessment o all real and personal estate within the corporate limits thereo subject to taxation for state purposes, and shall levy an a valorem tax on same, not exceeding the rate and limits pre scribed in the constitution, and for school purposes not exceed ing fifty cents on each one hundred dollars of taxable propert therein, or such portion of poll tax or license fees as the counci may designate; to levy a poll tax not exceeding one dollar an fifty cents on each adult male inhabitant thereof. . . . .

"Sec. 2981. In the ordinance fixing for any year the ta rate, the general council shall subdivide its levy as follows A levy for schools, a levy for the sinking fund, a levy for po lice purposes, a levy for the fire department, a levy for stree and sewer cleaning, a levy for sprinkling streets, a levy for re construction of streets, a levy for street repairs, a levy for con struction and repairs of sewers, a levy for the house of reform a levy for charitable institutions, a levy for parks, a levy fo library purposes, and a levy for general purposes and a déficit tax. The council shall cause the foregoing levies to be made for the purpose stated by an ordinance fixing the tax rate each year."

"Sec. 2825. The board of public works shall have exclusive control over the construction, reconstruction, cleaning, repairing, platting, grading, improving, sprinkling, lighting and using of all streets, alleys, avenues, lanes, market-houses, bridges, sewers, drains, wells, cisterns, ditches, culverts, canals, streams and watercourses, sidewalks, curbing and the lighting of public places."

It will thus be seen that there is ample statutory authority ss to uphold the sprinkling of the municipal highways at the public expense.

The constitution forbids the collection of any tax except fo a public purpose. Is the sprinkling of the streets a public purpose? If so, the city has a right to collect the tax; if not the ordinance, to the extent to which it authorizes a levy fo this purpose, is void. Cooley, in his work on Taxation, third edition, volume 1, page 211, says: "It is not doubted that th preservation of the public health is a public purpose of prim importance. Sanitary regulations are indispensable in larg towns, but they may be made for every locality. The right t provide for draining lowlands for the purpose is well settled and the right to protect lowlands from overflow may also b justified on the same reason."

doubted, at this day, that whatever is necessary
ation of the public health and safety is a public
the meaning of section 171 of the constitution.
se of furnishing the citizens with pure water,
y be established, and public wells dug and main-
the public highways may, without peril, be trav-
they may be lighted at the public expense. That
y have convenient and wholesome places for re-
rks may be established and kept. For the edu-
young, public schools are conducted. For the
indigent aged, almshouses are provided. For
of vicious youth, reformatories are maintained.
of the sick, hospitals are provided. For the pro-
public health, nuisances are abated, streets and
hed and cleaned. As a protection against confla-
epartments are established; and as safeguard for
erty, police departments are 880 organized. It
essfully denied that the dust upon the streets of
a fruitful source of disease, as well as of annoy-
tizens. The same principle which authorizes the
aned for the purpose of preventing noisome odors
of disease authorizes them to be sprinkled.
ted by counsel for appellants are not pertinent to
issue. Clark v. Louisville Water Co., 90 Ky.
aw Rep. 309, 14 S. W. 502, establishes the prin-
property of that corporation is subject to state
it does not thereby follow that the city may not
the corporation for the furnishing to its citizens
This reasoning on the part of counsel confounds
ice with the instrumentalities by which that ser-
ted. Whatever public service the municipal cor-
itself perform it may hire others to perform for
s that the latter method is the cheapest and the
ere be some constitutional or statutory inhibi-
case of City of Louisville v. Commonwealth, 1
295, 85 Am. Dec. 624, it was held that the fire
city of Louisville were not exempt from state
no one has ever doubted that the maintenance
rtment for the purpose of preventing conflagra-
ic service, or that the levy of taxes for its main-
horized.
y of cities to clean its public highways, that they
ne a nuisance. If, in their wisdom, they see fit

to hire others to perform this service, it does not follow tha the carts used by the contractors are exempt from taxation; no can it be deduced therefrom that because they are not exemp the cleaning of the streets is not a public service. And yet thi is the sole contention of 890 appellants. Logic could not b more faulty or inconsequential. The Louisville Tramwa Company is a corporation organized for the purpose of sprinl ling the public streets more rapidly and cheaply, by utilizin the street-car tracks, than could otherwise be done. We ar able to perceive no reason why the municipality may not con tract with it to perform this service, so essential to the health happiness, and convenience of all its citizens.

The owners of property abutting upon the highways sprinkle may get some local advantage distinguishable from that of th traveling public; but this always happens in the performanc of public duties. If a park is established, those who own prop erty nearby enjoy an increased value thereof by reason of it proximity to the public pleasure ground; but it does not fol low that the establishing of parks is any less a public purpos for this reason. The establishing of a state college in a give city affords that city a local advantage not enjoyed by othe cities of the commonwealth; but no one would question tha education is a public purpose because of this fact. All th citizens have a right to travel the public streets, and, in orde that their health and convenience may be conserved, the cit may provide that they are reasonably safe, clean and free fro substances deleterious to the public health.

As sprinkling the public ways clearly comes within the con stitutional requirement of a public purpose, the judgment o the lower court dismissing the petition seeking to enjoin th levy and collection of the tax for that purpose is affirmed.

The Furnishing of Means and appliances for lighting the street of cities and towns, and the supplying of their inhabitants wit water for domestic use and for the extinguishment of fires, are pub lic purposes authorizing the exercise of the taxing power: See th monographic note to Zigler v. Menges, 16 Am. St. Rep. 369.

SHINKLE v. McCULLOUGH.

[116 Ky. 960, 77 S. W. 196.]

OBILES—Excessive Speed—Negligence—Frightening erson, while operating an automobile on a highway at te of speed and with much noise, thereby frightens a to a buggy, whereby the buggy is overturned and the of injured, the operator of the automobile is guilty of liable for the injury. (p. 251.)

CE Given on Another Trial—Impeachment of Witness. to recover for injury caused by the overturning of a ghway by a horse attached thereto, after such horse ghtened by an automobile operated at an excessive evidence of a statement made by the operator of the another action to recover for injury to the buggy in ent, to the effect that he considered himself responsi- admissible as tending to contradict his evidence given injury case, that he was not guilty of negligence at accident. (pp. 251, 252.)

OBILES are Lawful Means of Conveyance, and have on the public roads with horses and carriages, but be accompanied with that degree of prudence and nd consideration for the rights of others, which is their safety. (p. 252.)

OBILES—Care Required in Management of.—If one utomobile upon a highway knows, or in the exercise re should know, that the machine has so far excited a horse, as to render it dangerous and unmanageable, of such person to stop the automobile and take such the safety of the driver of the horse as ordinary suggest. Otherwise, the driver of the machine is gence. (p. 252.)

—Excessive Verdicts.—If there is abundant testi- in the finding of the jury as to damages in a per- se caused by negligence, the verdict will not be set ve. (p. 252.)

e, for the appellant.

er and M. H. McLean, for the appellee.

AM, C. J. Whilst the appellee, W. T. McCul- riving along a public highway leading from the gton on the 29th of August, 1901, with two com- net the appellant, Clifford Shinkle, riding in an Appellee's horse became frightened at the auto- pset his vehicle, throwing him upon the turnpike g injuries to his clothing and person, and perma- ing 963 the vision in one eye. For these alleged stituted this action for damages, and alleged that

the defendant, while in sight and approaching him, had recklessly and negligently propelled his automobile at a rapid and dangerous rate of speed up to and within twenty-five feet of his horse, notwithstanding the fact that he saw, or could have seen, that plaintiff's horse had become frightened, and in disregard of repeated warnings to slacken his speed, and that by reason of defendant's refusal to heed these warnings his horse became frightened, and, in his efforts to escape, turned over his buggy, inflicting the injuries complained of. The defendant, in his answer, denied all the allegations of negligence recited in the petition, and pleaded contributory negligence. Upon the trial of the case before a jury, the testimony introduced by the plaintiff was to the effect that the defendant was traveling at a very high rate of speed (some of the witnesses put it at as high as twenty miles an hour); that the motive power was gasoline mixed with air, which made a noise, when the machine was in operation, which could be heard at a distance of about two hundred feet; that as soon as the plaintiff's horse heard this noise it began to take fright, and plaintiff and those with him at once began to shout and signal to the defendant to slacken his speed, but that he failed and refused to do so until he had driven the automobile to within thirty or forty feet of plaintiff, by which time his horse became so unmanageable as to upset the buggy; that the defendant saw that the horse was frightened, and the plaintiff's peril. The testimony on the other hand was that the defendant saw the plaintiff for about two hundred feet driving along, apparently paying no attention to the approach of the automobile, the horse being apparently perfectly quiet; that, when he got within about one hundred feet of the plaintiff, the horse suddenly shied, upsetting the buggy in the middle of the road; and [964] that the defendant immediately slowed down his automobile, alighted therefrom, and went to assist the plaintiff. He also testified that the customary signal to slacken speed, by holding up the hand, was not given, and that as soon as he discovered the peril of plaintiff he stopped his machine, and that he was not going at exceeding six or seven miles an hour. The trial resulted in a verdict and judgment for the plaintiff for one thousand and twenty dollars, and the defendant has appealed. He asks a reversal, first, for alleged errors in the second instruction, and also in the instruction defining the measure of damages.

Instruction No. 2 is as follows: "If the jury believe from all the evidence that, at the time and place of injury to plain-

lant was operating said automobile at a high rate
that because of said rate of speed, or because of
eed together with the noise emanating from said
horse of plaintiff became frightened, and caused
plaintiff, and if the jury further believe that the
nt in operating said automobile at a high rate
did so operate it, was an act of negligence on
defendant, the jury should find a verdict for the
e complaint of this instruction is that it author-
to find for the plaintiff if they believed that his
frightened either at the speed of the automobile,
d and noises emanating therefrom; it being no-
in the pleadings that the horse was frightened
This instruction only authorized a recovery in
ury found from the evidence that the automobile
ated at a high rate of speed, although the horse
alarmed not only by the high rate of speed at
hine approached, but also at the noise emanating
sides, appellant himself testified that the oper-
he machine was always accompanied by noise,
s-examination the witness Hanauer testified to
; and the only noise spoken of in the instruction
was incident to the running of the automobile.
e instruction, if it was in fact an error, was not,
, prejudicial to the defendant.
ion defining the measure of damage is not ob-
n fact, it has been approved by this court in
he form in which it was given in this case in
s.
so complains that the trial court erred in per-
e to prove a statement alleged to have been made
he trial in a justice's court in an action on ac-
irs to the buggy injured in this accident, to the
considered himself responsible for the accident.
s contention, we are referred to the note to sec-
Greenleaf on Evidence, in which the editor says
evidence of this character is only allowed when
re of the case the facts cannot be stated or de-
jury in such manner as to enable them to form
dgment thereof, and no better evidence than
is attainable." The author, in the section re-
discussing the competency of expert testimony.
testimony was competent as an admission of de-

fendant, because it tended to contradict the testimony of t defendant given upon the trial of the case to the effect that had not been guilty of any negligence which superinduced t accident complained of.

While automobiles are a lawful means of conveyance, a have equal rights upon the public roads with horses and c riages, their use should be accompanied with that degree 966 prudence in management, and consideration for the rig of others, which is consistent with their safety. If, as the ju found by their verdict, appellant knew, or could have kno by the exercise of ordinary care, that the machine in his p session and under his control had so far excited appellee's ho as to render him dangerous and unmanageable, it was his du to have stopped his automobile, and taken such other steps appellant's safety as ordinary prudence might suggest.

Appellant also complains that the verdict is excessive. T testimony shows, that, in addition to the mere superfic bruises received by appellant, there has been a permanent a serious loss in the vision of one of his eyes, as the result o severe cut and bruise immediately over it, received at the ti of the accident. It is impossible for us to determine the tent of the pecuniary loss which may accrue to appellee fr an injury of this character, not to speak of the pain and suff ing and inconvenience resulting therefrom. This was a qu tion for the jury, and there was abundant testimony on t point to support their finding.

For reasons indicated, the judgment is affirmed.

The Law Governing the mutual rights and liabilities of travel on public roads is discussed in the monographic note to Riepe Etling, 48 Am. St. Rep. 366-381.

CASES

IN THE

EME JUDICIAL COURT

OF

MAINE.

PHILLIPS v. LAUGHLIN.

[99 Me. 26, 58 Atl. 64.]

E.—A New Trial will be Granted where the pre-
vidence is against the verdict, and all the circum-
ing the transaction in question show the improb-
oposition which is necessary to sustain the verdict.

E—Declarations of Party in Possession When not
urchaser for value from one apparently vested with
s not liable to be confronted with, and to have his
, declarations made by a grantor to the effect that a
at grantor, which, so far as appears, is in due form
all respects to convey the title, is for some reason
6, 259.)

o recover a lot in Bangor to which the plaintiffs
heirs of John Phillips and the defendant under
f a mortgage executed by Catherine Phillips,
4, and then recorded. The defendant, in sup-
m, introduced in evidence what purported to be
l by John Phillips to Catherine Phillips, Octo-
n California, with a certificate of a notary of
hed thereto, showing its execution on October
me year. The plaintiffs insisted that this con-
forgery, and offered, and the court, against the
ection, received in evidence as exhibits 16 and
vritten by Catherine to John as follows:

EXHIBIT No. 16—PLAINTIFF.

worth twenty thousand dollars I wont let it go

the 20, 1893.
Bangor Octobe

Dear Brother I write those few lines to not to sell this pla
where I am If you can come I would like to have you the wa
rember
to take it from me, it is ten thousand dollars, rember, 10,00
Dont sell if the writ to for it (do as I tell you) The want
take it from me for nothing.

The are going to write to you for it be shure and don't s
for your life.

Tell them that it is yours Daughters Dont sell it is worth t
thouse Dollars. Tell them you canot sell it that it belon
to your Daughter. Dont answer there letter I will send y
three thouse Dollars I would like to have you come on if y
can but dont sell nor answer there lette they want to take
from me your Sister Catherine Phillips.

answer

Tall them that you dont want to sell it dont aswer the
letter this place is Fifteen thousend Dollars.

I would have written to you before this only they are tryi
to get it for nothing.

Be shure and dont let them know that I have writte to y
you can live on the money it is wort Fifteen thouse Dolla
dont you sell it for your life but come on if you can write
soon as
me as you get this and dont delay.

Dont you write and give thme yor money for nothing t
them That it is your Daughters and you cannot sell It th
want to take it For nothing Catherine Phillips

Your Sister Catherine.

be shure and dont write To them mind what I say
Your Sitert Catherine

do as I tell you

I wish you could come Dont you lat them have It now it
wort more than I can tell you now tall them you cant sell
write to me without delay.

Yours Caister catherine

It is worth $25. thousand Dollars and I wont sell It less mi
what I tall you, do as I say Dar Brother I wish you cou
come here But do as I tell you. If you should write to the
tall them That you cant sell and your Daughter dont want
sell her"

'EXHIBIT No. 17—PLAINTIFF.

Bangor May the 18, 1893.

r I write these few lines to not to sell this house
n eight thousand dont write any lawyr or Regiser
e first If you do write tell them you cant sell
aughter wont sell hers for your life dont give it
m me first dont mind
dirty raskeel and when you do want and must
will let me know but dont answer there Latter
ne as soon as you can you have a lot Of money
throw It away mind what I tell you Yours sister
llips come on I have done wall for you dont give
r them to have it See what you are doing first
ut the very soule out of you come on if you can
write to me dont write them until you heer from

Catherine Phillips.

write tell them you dont wont to sell you place
you all a good living keep sill dont say anything
l send you rant write when you get this

Phillips

Your Sister Catherine"

ailey, for the plaintiff.

aughlin, for the defendant.

LL, C. J. Real action in which the demandants
at law of John Phillips who, admittedly, was at
d in fee of the demanded premises. The defend-
nder a deed from John Phillips to Catherine
having acquired title to the premises from Cath-
leed to her was a valid one and conveyed the title.
sole question at issue at the trial, viz., whether or
which purports to have been signed by John
ctober 3, 1885, acknowledged by him on the same
notary public in the state of California, where the
or then lived, and received for record in October,
Penobscot county register of deeds, in which county
situated, was the deed of John Phillips. The
claim that Phillips' signature to this deed was
trial resulted in a verdict for the demandants,
ndant brings the case to the law court upon mo-
eptions.

A careful examination of all the evidence, an analysis of which would not be here profitable, satisfies us that the great preponderance of the evidence was contrary to the finding of the jury upon this question; and a consideration of all the circumstances surrounding the transaction and which throw any light upon the question, shows that the improbability of the demandant's proposition, that the deed was forged, is so great that we are forced to the conclusion that the verdict was erroneous and that justice requires that the motion for a new trial should be granted.

Although this disposes of the case, we think it proper that an important question relating to the admissibility of evidence offered should be considered and decided, as the same question will undoubtedly arise in a subsequent trial, if there should be one.

While Catherine was in possession of the premises, subsequent to the conveyance above referred to from John Phillips to her, and before she parted with her title, she wrote to the grantor, her brother, two letters which, it is claimed, have some tendency to support the [32] demandants' proposition that the signature of John to the deed in question was forged. These letters were offered and admitted in evidence subject to the defendant's exception, although the precise point subsequently argued, and which we now propose to consider, was not stated as a reason why these letters should not be admitted in evidence. This raises the question as to whether the declarations of a party in possession of and claiming to own land, against his interest, as to the validity of a duly recorded deed which purports to convey the title to him, are admissible in evidence against a party to a suit who claims title under such declarant.

In other words, is a purchaser for value from one who apparently has the record title to land, in the trial of a case involving his title, liable to be confronted, and to be devested of his title, by a declaration made by his grantor to the effect that a conveyance to that grantor, which, so far as appears, is in due form and sufficient in all respects to convey the title, is, for any reason invalid? A doctrine which would admit evidence of such a character would certainly be a most dangerous one, since it would allow the most reliable evidence of title to land to be contradicted and overcome by evidence of alleged declarations, and admissions of his grantor, made perhaps many years before, and which is recognized as a most unreliable species of evidence. It would permit the title of an innocent purchaser for value,

which depended upon records and deeds, and which had been acquired by a purchaser after first taking every precaution possible, to be overcome by the mere oral evidence of alleged declarations as to the validity of the deed under which his grantor acquired his title.

We are unable to perceive any good reason why, and we are not aware of any general rule under which declarations of this character should be admissible, while the reasons already suggested why a purchaser's title should not be devested by evidence of this character, are most obvious. This evidence at best is hearsay evidence and should be excluded under the general rule in relation to such evidence, unless it comes within some well-recognized exception to that rule, and exceptions to this salutary rule should not be multiplied or extended. The exception to the effect that the declarations of a party to a suit contrary to his interests are admissible, a well-recognized rule, is not sufficient to make admissible the declarations of a third person, the party's grantor, which have a tendency to contradict records and matters which can only be proved by deeds and by records.

It is true that numerous cases contain the general statement that declarations made by a person while in possession of land in disparagement of his title are admissible against those claiming under him. But an examination of a large number of cases wherein this general statement is made, or which are cited in support of such a statement in digests and text-books, shows that in almost every case the declaration held admissible is in regard to the nature, character or extent of the declarant's possession, or as to the identity of monuments or the location of boundaries called for in a deed. For instance, in Osgood v. Coates, 1 Allen, 77, the court said in referring to a declaration of such a character which was held admissible: "It tended to show that his occupation was not adverse to the record owners." In Blake v. Everett, 1 Allen, 248, the question was as to whether a right of way had been gained by prescription, and it was held that the declarations of a former owner of the land made during his ownership and tending to prove the existence of such a right of way, were competent evidence against the person claiming under him. In Hyde v. County of Middlesex, 2 Gray, 267, it was held that the declarations of a former owner of land in regard to a dedication of the land to a public use were admissible in evidence against a subsequent owner. In Simpson v. Dix, 131 Mass. 179, the question was as to who in

A careful examination of all the evidence, an analysis of which would not be here profitable, satisfies us that the great preponderance of the evidence was contrary to the finding of the jury upon this question; and a consideration of all the circumstances surrounding the transaction and which throw any light upon the question, shows that the improbability of the demandant's proposition, that the deed was forged, is so great that we are forced to the conclusion that the verdict was erroneous and that justice requires that the motion for a new trial should be granted.

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fact was the grantee intended in a deed, there being two person of the same name, and it was held that the admissions of on made while he was occupying the premises that the premises be longed to the other were competent against a person claimin under the declarant. In Horner v. Stilwell, 35 N. J. L. 307, th question involved was as to the height at which the defendan was entitled to hold the water in his pond by means of a dam and the declarations offered and admitted were in relation to thi question, and as to the previous height at which the dam ha been maintained. In Cook v. Knowles, 38 Mich. 316, the cour went rather further than in most of the other authorities whic we have [34] noticed, and held that such a declaration tendin to show the true date of the delivery of a deed was admissible In this case the dissenting opinion of Judge Cooley contain a very full analysis of the authorities up to that time, 1878, upo this question, at the conclusion of which he says, "but an ex amination of the cases will show, I think, that not more tha one or two go to the extent here claimed." This opinion con tains a valuable discussion of the question here involved. Bu the extent to which a majority of the court went in that case in holding that declarations tending to show the true date o the delivery of the deed are admissible, falls short of the posi tion of the plaintiff in this case, to the effect that declaration tending to show that the deed which conveyed to the declaran an apparently perfect record title was forged, are admissible.

But these are all matters that must be proved or disprove by parol evidence. Every purchaser knows that however per fect a record title he may have acquired, this title may be af fected by parol evidence of disseisin, or of an easement gaine by prescription, or as to a right of flowage lost or gained b user, or as to the location upon the face of the earth of monu ments and boundaries called for in his or some prior deed. S that if any of these questions are involved, which can only b proved or disproved by parol evidence, the declarations of person against interest, who had been in possession, as to th character of that possession or as to its extent, are admissibl on sound reason. So too, if the question at issue is as to th location or identity of monuments, it is obvious that th declarations of a person in possession, who has peculiar oppo tunities for knowledge in regard to such matters, are also ad missible for equally good reasons. But a purchaser who ha obtained a deed of real estate from one who has the record titl thereto cannot, and ought not to be obliged to, anticipate tha

fronted by the declarations claimed to have been
ourt, by a predecessor in title, to the effect that
the chain of title, which bears all the insignia
and which has been held out as such, is, for any

the extent to which the authorities have gone in
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to make the general statement that declara-
persons while in possession of land, against his
dmissible against anyone claiming under him,
rcumstances of the particular case have not re-
precise statement of the rule. We cheerfully
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ich declarations against interest in regard to the
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s called for in a deed, or in regard to any mat-
the physical condition or use of the property,
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ut we decide that it is not competent to prove
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n action in court, to the effect that a deed which
sufficient in all respects which is duly recorded
urchaser has been led to rely upon as one of the
s in its chain of title, from the very fact of its
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h declarations has been stated, this sentence from
n Evidence, section 109, is quoted, "declarations
ent of the title of the declarant are admissible,
dence." But an examination of the whole section
e learned author was referring to the declarations
possession of land "explanatory of the character
ssion." The author goes on to say in the same
session is prima facie evidence of seisin in fee
he declaration of the possessor that he is tenant
is said, makes most strongly against his own in-

terest, and therefore is admissible. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title or otherwise qualifying his possession, if made in good [36] faith, should not be received as part of the res gestae; leaving its effect to be governed by other rules of evidence."

In 2 Wharton on Evidence, section 1157, the author quotes from Cook v. Harris, 61 N. Y. 448, this statement in regard to the admissibility of such declarations: "The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record and of a higher and stronger nature than to be attacked by parol evidence. They are competent simply to explain the character of the possession in a given case." The rule is thus concisely stated but with the necessary qualification, in 1 American and English Encyclopedia of Law, second edition, 680: "The admissions of a person in disparagement of his title, but not in contradiction of a record title, are competent evidence against those claiming under or through him so far as there is identity of interests." And see the cases cited in support of the qualification.

In Dodge v. Freeman's Saving etc. Co., 93 U. S. 379, 23 L. ed. 920, it was decided that: "The declarations of a party in possession of land are, as against those claiming under him, competent evidence to show the character of his possession and the title by which he held it, but not to sustain or destroy the record title."

In the case of Carpenter v. Hollister, 13 Vt. 552, 37 Am. Dec. 612, a very closely analogous question was presented. The issue of fact in the case was as to the competency of a prior grantor in the chain of title to make a deed. The declarations against his interest of the grantee in that deed, a predecessor in title of the defendant, were offered upon that question. The court after reviewing the authorities and calling attention to what in fact had been decided in the cases cited, said: "In this case, the plaintiff insists that the concessions of the grantor made while in possession not explaining or qualifying that possession, are admissible to defeat his title, apparently good of record, even against an innocent, bona fide purchaser, or good consideration. This we think dangerous and unprecedented." In the case cited the person whose declarations were offered was living at the time of the trial, while in this case Catherine Phillips was dead at the time that these declarations

but in our opinion [37] this in no way affects the
objection is to the character of the alleged
s bearing upon the validity of a deed apparently
it can make no difference as to the admissibility
ations whether the declarant is living or dead.
refore satisfied, both upon reason and the great
thorities in cases where this question has been
at the declarations of Catherine Phillips, made
ord title was in her, as to the validity and gen-
e deed from John Phillips to her, were not admis-
his defendant.
exceptions sustained.

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arations of a Grantor anterior to the delivery of the
nce against him and those claiming under him, see
rne, 4 Jones, 157, 67 Am. Dec. 269; Horton v. Smith,
m. Dec. 628. See, too, Mobile Sav. Bank v. McDon-
4, 18 Am. St. Rep. 137. But it is held in Carpenter
Vt. 552, 37 Am. Dec. 612, that the declarations of a
ession are not admissible to defeat the grantee's title,
not of a character explaining or qualifying the pos-

WHITE v. FARNHAM.

[99 Me. 100, 58 Atl. 425.]

ORMANT PARTNERSHIP the funds of the visible
ose appearing to be his, although actually belonging
hip, are, with respect to the rights of innocent third
regarded as his sole property. (p. 266.)

ERSHIP, DORMANT, Who can Assert Claim Against
f there is a dormant partnership of which the public
ne cannot, under a mortgage purporting to be executed
rship by the dormant partner, assert title to property
ee in bankruptcy of the other partner, who, without
partnership and without knowledge that the property
wholly to the estate of the bankrupt, sold it as such
6.)

in, H. M. Cook, W. R. Pattangall and B. C. Addi-
laintiff.

n, T. B. Towle, F. H. Appleton and H. R. Chap-
efendant.

R, J. This is an action of trover brought to re-
defendant, as trustee in bankruptcy of M. M.

Grant, the value of certain personal property which came in the hands of the defendant from the estate of said Grant ar was duly sold by him, as trustee, as an asset of said estate.

The plaintiff claims under a mortgage, which, he says at tl time of said sale, had vested in him a valid lien upon the who of the property sold. The facts are as follows: M. M. ar Samuel Grant were copartners in the lumber business in tl fall of 1894, and as such carried on lumbering operations, e tending into 1895. After this year's business was practical concluded, in the fall of 1895, M. M. having become dissatisfi with his business associations with Sam, desired to sever h partnership relations with him, and claims that he did so full; but the plaintiff contends otherwise and asserts that qualified partnership between them was continued through a the years covering his transactions with M. M. Grant. H own statement of the interview which established the dormar partnership is this: "They met on the street and Madison sa "They are annoying me, Sam's creditors are annoying me ever time I am here,' and he says, 'I would like [103] to have h name stricken from the firm and he remain what we call blind partner.' I thought I understood the law that th could be done." "Well, I says that will be all satisfactor He told me what he had said to me, that I should have my p first, and that would be all satisfactory, and it was left in th way, and from that time out everything was between him ar I. He used his name in our settlement and that was all the was to that affair." The plaintiff therefore knew of ar agreed to Sam's becoming a "blind partner" in the fall of 189 and thereafter did all his business with M. M. not as a mer ber of the firm but as an individual. January 26, 1898, took, in a settlement involving these alleged blind partnersh transactions, M. M.'s individual note for over eighteen tho sand dollars. With respect to the signature on the note says: "This is signed by Madison Grant. He signed that— of the papers to me after the first year, after we made t agreement he should be a blind partner, when Sam's name w dropped."

Thus it appears from the plaintiff, himself, that after 189 he not only knew it, but entered into an agreement with t Grants, that Sam should be continued as a blind or dorma partner, and that M. M. should be held out to the communi as doing business alone. Not only did the plaintiff agree this, but all of his own business transactions with M. M. we

istent with the agreement, and calculated to pre-
o the public as the only visible partner. This al-
ess arrangement between the plaintiff and the
nued until November 12, 1898, when M. M. Grant
luntary bankruptcy. In the meantime the mort-
which the plaintiff claims, was executed on the
ay of October, 1898, by Samuel Grant, the alleged
er" without the knowledge or consent of M. M.
s signed "M. M. and Sam Grant by Sam Grant,"
ll the horses, sleds, harnesses and other utensils
M. M. in his lumbering operations. All of this
never acquired was ostensibly the sole property of
e appeared to all the world to be the only owner.

e purposes of this case, we have assumed that the
tement of facts, as above given, is true. This was
admitted at the trial, nor do we wish to be under-
ing that Sam Grant was a "blind partner." We
be so for the purpose, only, of considering the
light of the plaintiff's own contention with respect
and one which, if true, is decisive of this case.

counsel in their brief state the issue to be "in
e his own title the plaintiff must satisfy the court
ber 18th, at the time the mortgage was given, Sam
partner of Madison M. Grant." If counsel use the
r" in the ordinary sense, their position, as a mat-
statement, is undoubtedly correct; but if, by the
rm, they mean such a qualified relation to M. M.
tiff has described by the phrase "blind partner,"
, if existing, would not authorize Sam Grant to
the partnership property as to conclude the rights
nt third party, dealing in good faith with the os-
ner as an individual and without knowledge to the

pon authority nor reason does the law permit a
o manifestly calculated to work an injury as that
the plaintiff. What was attempted in this case
rates the pernicious operation of a law which would
. M. Grant was ostensibly doing business as an
As such he established his credit. Parties trust-
a right to rely upon his ability and honesty, as
roperty, for their security. But having given credit
pon the assumption that they were dealing with the

visible partner only, then Sam Grant, who had never befor been heard of in connection with M. M., except by the plaintiff suddenly discloses his blind relationship and, within the time sufficient to enable him to sign two names to a mortgage, conveys to the man, who was in the "blind partner" secret, every vestige of the operating property of which M. M. Grant was ostensibly or actually possessed. Those who had given credit to M. M., upon his apparent and declared ownership of this property, were, by the stroke of Sam's pen, abruptly informed that they had based their [105] credit upon a shifting sand. Such a transaction cannot be permitted to stand. The law will not allow it. The question involving the rights of parties in their dealings with silent or dormant partnerships was, at an early day, considered by both our own court and that of Massachusetts.

In French v. Chase, 6 Me. 166, the plaintiff in replevin claimed title to the goods in question under a sale of them by Walter Brown. The defendant pleaded property in Brown and Quimby, as partners, and that he as a deputy sheriff attached the goods by virtue of a writ against them, issued upon a partnership note, signed by Quimby only. It was admitted that Brown and Quimby were partners and that the firm was insolvent. The partnership, however, was a secret one and at one time was carried on in the name of Quimby, and afterward by Brown in his own name, Quimby having no apparent interest in it. Such was the case when the plaintiffs made the purchase. The defendant contended that he had a right to the goods by virtue of the attachment, on the ground that the note was given for a partnership debt, and came within the well-known principle that partnership funds must first be applied to partnership debts, and that, until such debts are satisfied, a creditor of one of the firm cannot appropriate any portion of them. But the court says (page 169): "The question here is, whether this principle is applicable in the present case when Brown alone was the ostensible owner, and the existence of any partnership was wholly unknown to the plaintiffs. To extend the principle thus far would be unreasonable and unjust, and further, we apprehend, than it has ever been carried by any judicial decision. The reason upon which the doctrine is founded cannot exist where the business of a secret partnership is all transacted by and in the name of one of the partners, who appears to all the world as the sole owner."

n that case are identical with those in the case at
case the plaintiffs obtained title to the goods from
partner, the defendant, upon a note of the silent
a firm debt. In the case at bar the defendant re-
rough the ostensible partner; the plaintiff through
er upon a firm debt.

d v. Baldwin, 6 Pick. 348, the same principle is
governing this class of cases. At this time, 1828,
, in delivering the opinion of the court took occa-
k that "the question presented in this case is en-
nd that "the silence of the books themselves seems
he unsoundness of the doctrine now sought to be
ch was identical with that asserted by the plaintiff
bar. In applying the ordinary principles of law
partnership matters to the facts in the case here
ng a silent partner, the court on page 350 use
: "It is only the application of this principle to
arise which can afford any room for argument or
order to determine such question, the reason of
t be sought for, and the particular case must be
out reason, as well as within the terms of the
sis upon which the rule rests is, that those funds
upon which the credit is given. Those who sell
e contracts with a company or firm are supposed
ability or property of the firm. Those who trust
member rely upon his sufficiency alone."

ase before us is that of a dormant partnership,
essarily, from its very character, unknown at the
lity is incurred." In this case the dormant part-
ght to light by ex post facto investigation and the
discovered him claimed a preference upon the
y. But the court says that the reason for the
they claim a preference does not exist, and that
[the dormant partner] owned the whole of the
veen him and the known man of business, still it
property of the latter, for he is allowed to claim
his alone, and thus lead persons to trust him upon
he goods in his possession."

ck v. Johnson, 2 N. J. Eq. 163, both the above
reviewed, and the reasons and principles therein
approved and adopted. With respect to Lord v.
ick. 348, the chancellor says, "the true principle
nion, laid down in that case." Then referring to

the reasons in his own language, he says: "In an open firm t
credit is given to the firm and to the goods they [107] are p
sessed of; and a partnership creditor shall be first paid o
of them; but if the partner be unknown the credit is given
the visible partner only, and the goods in his possession are su
posed to be his own, and in such case the discovery of su
latent partner cannot give any preference to a partnersh
creditor. As between the partners themselves, I see no reas
to make any distinction in their rights, whether they are d
mant or not; but as to the public, it is not only highly prop
but necessary to prevent injustice toward creditors, that th
difference should be observed." The case of French v. Gree
leaf, 6 Me. 166, he says "is still stronger." He finally co
cludes by saying: "Upon a careful examination of the cases
this subject, as well as from the reason and propriety, I a
clearly of the opinion that the execution creditor has his reme
complete against all the effects of the visible partner, and
the effects which belong to him and his dormant partner
partners, and that it makes no difference whether the debt w
contracted by the debtor on partnership account or on his i
dividual account."

These decisions, conceding the plaintiff's own contention
to the facts, are decisive of the case against him. The proper
sought to be conveyed by Sam Grant was admitted to be in t
possession of M. M., the only visible partner, and there is
suggestion that any of the creditors, whom the defendant,
trustee in bankruptcy, represents, had any knowledge of t
dormant partner or gave any credit to him. This proper
then was first subject to the liabilities of M. M. Grant, wheth
by attachment or in bankruptcy.

The above decisions declare the rule to be that, in a dorma
partnership, the funds of the visible partner and those purpo
ing to be his, although actually belonging to the partnersh
are, with respect to the rights of innocent third parties, to
regarded as his sole property. In fairness to M. M. Grant,
should be stated that he emphatically denied any partnersh
whatever with Sam Grant, secret or otherwise.

In accordance with the stipulation in the report the ent
must be, judgment for the defendant.

Dormant Partnerships are discussed in the monographic note
Brooke v. Washington, 56 Am. Dec. 147-151; and the subsequent ca
of Pitkin v. Benfer, 50 Kan. 108, 34 Am. St. Rep. 110; Richardson
Farmer, 36 Mo. 35, 88 Am. Dec. 129; Bromley v. Elliot, 38 N. H. 2
75 Am. Dec. 182.

ROCKLAND. THOMASTON AND CAMDEN STREET RAILWAY COMPANY.

[99 Me. 149, 58 Atl. 775.]

ICE—Burden of Proof in Actions for Personal Injuries. gainst a street railway company to recover for personal the collision of its car with a wagon on which the riving, the burden is on him to show that his injuries y the negligent act of the defendant or its servants, ant of due care on his part contributed to the injury, elf was guilty of contributory negligence, that some ater negligence of the defendant was the proximate jury. (p. 271.)

RIAL—Verdict, When may not be Set Aside.—A court , or even permitted, to set aside a verdict merely be- came to a conclusion different from that to which the ave come. The jurors have the right for themselves he credibility of the witnesses, how far their stories from the truth of the statements thus made, to make inferences, and, unless their conclusions are palpably erdict cannot be disturbed. (p. 271.)

ET RAILWAY COMPANY has the Right to Operate the Location Where it was Placed, either singly or g due regard to the safety, not only of travelers upon of those who may have occasion to cross the track in om the yards of houses situated along the railway.

RAILWAYS.—The Speed at Which a Car or Train Properly be Run, or kind of control over it, and the hfulness imposed upon those in charge, must depend, , upon surrounding conditions, such as the nearness of e side of the street and to the houses, or the likeli- s driving out of yards, and whether the driveways l that persons driving out of them can see or learn h of cars, in season, with due care, to avoid collision.

RAILWAYS have the Right to Assume that Persons Yards Toward or upon the Track will themselves be of ordinary care. (p. 271.)

RAILWAYS.—It is the Duty of a Street Railway to or Approaching Its Tracks, in view of apparent f those which may reasonably be expected, so to reg- l of its cars, so to have them under control, and so to out for teams about to cross the track that such per- elves in the exercise of due care, shall not be put in 272.)

ET RAILWAY Corporation may Properly Assume that Far Enough Away to Cross Safely, will continue his l cross in front of the car, or, if not far enough away, of the approach of a car, that he will stop and let it e person in charge of a car must exercise due care and the movements of the car must be regulated with he apparent situation. (p. 272.)

STREET RAILWAYS.—If It be Apparent that a Collision Likely to Occur, it is the duty of the servant in control of the c to be ready to use, and to use if necessary, all practicable means prevent it. Anything less is want of due care. (p. 273.)

NEGLIGENCE, CONTRIBUTORY, When must be Inferred. If a person seated in a wagon where he could not see a train of ca without looking out, drives in front of a coming train, without looking, and who, if he looked, must have seen the train when le than two hundred feet away, drives at a walk along the track, and struck by a train and injured, he must be adjudged guilty of co tributory negligence. (p. 273.)

STREET RAILWAYS.—The Duty of a Traveler Approachi a Street Railway Crossing is to exercise care to avoid a collisio The care must be that of an ordinarily prudent man in view of all t existing conditions. (p. 274.)

NEGLIGENCE, CONTRIBUTORY, When does not Preve a Recovery.—Where a plaintiff suing to recover for personal injuri is shown to have been himself guilty of contributory negligence, may, nevertheless, recover, if he can show that after his contributo negligence, the defendant, in view of the entire situation, was c pably negligent, and such culpable negligence was the latest in t succession of causes resulting in the plaintiff's injury. (p. 276.)

CONTRIBUTORY NEGLIGENCE Continuing Up to the Ti of the Accident precludes the plaintiff's recovery, although the d fendant was culpably negligent after discovering such contributo negligence of the plaintiff. Such negligence of the defendant is n subsequent to, and independent of, but is contemporaneous with, t plaintiff's contributory negligence, and where contributory negligen is an operative cause to the last moment and contributes to the i jury as a proximate cause, it precludes recovery, although the plai tiff's negligence contributes up to the same moment. (pp. 276, 277

NEGLIGENCE.—The Doctrine of Contributory and Sub quent Negligence is not applicable when the negligence of the plai tiff and that of the defendant are practically simultaneous. (p. 277

J. E. Moore and D. N. Mortland, for the plaintiff.

Arthur S. Littlefield and Arville D. Baker, for the defendar

[150] SAVAGE, J. Case for damages for personal injuri sustained in a collision between the defendant's cars and t team in which the plaintiff was riding. The plaintiff obtain a verdict which the defendant, on motion, seeks to have s aside.

It appears that the line of the defendant's railway in Roc port, at the point where the collision occurred, lies on the eas erly side of the highway, and the outer rail toward the sid walk is nineteen feet from the southwesterly corner of a hou known in the case as the Shepard house. By the driveway lea ing easterly from the street by the southerly side of the She ard house to the yard the [151] distance from the rail to

he corner of the house is twenty feet. Standing
f the Shepard house and looking northerly to-
he first object or obstruction to vision is a trol-
eighty-four feet from the center of the drive-
rdinary distance easterly from the rail. One
irty-one feet farther on in the same direction is
pole, and on each side of the pole a tree a foot
diameter. The trees were each about ten feet
were in line with it, and trees and pole were
with the railway track. These trees and pole
a view of the track. One hundred feet farther
ndred and fifteen feet from the center of the
third trolley pole. Between the second and
easterly, and upon the easterly side of the road,
ed the Burgess house. There are three slight
ilway track, and beyond the Burgess house, near
spoken of, the house obstructs the view and the
om the sight of an observer who may be at the
hepard house. So much for the physical situa-
h there seems to be no controversy.

1902, the plaintiff, who was a clerk in the gro-
driving a covered delivery wagon. The cover
forward as the front edge of the seat, and rose
, and so over to the other side. The effect was
iff, if sitting on the seat, could not look out at
ithout leaning forward. He started from Rock-
hich is southerly from the Shepard house, and
ouse where he called. He testified that on his
e of the defendant's passenger cars proceeding
toward Rockport. These cars run half hourly.
the yard on the southerly side of the Shepard
delivery of goods, returned to the wagon, took
and drove out westerly toward the street. The
d that as he came out of the yard, he looked
direction of Rockport, having in mind the car
would cross the one he had met, at Eells cross-
he south, and would be coming toward the Shep-
that when he reached the corner of the Shep-
he pulled up the reins a little and leaned for-
d looked northerly on the track toward Camden,
see any cars, nor hear any, nor hear any bell or
hen settled back upon the seat and drove on to
hat his horse was walking all the time.

Meanwhile, a train of the defendant's cars loaded with lin rock was being propelled southerly from a quarry, past t Burgess house, and the trees which have been spoken of, ward the driveway at the Shepard house, on its way to the lin kilns in Rockport. The train consisted of three rock c pushed by a motor car in the rear. Each rock car was thirte and one-half feet in length and the motor car was nineteen fe The length of the train was in all fifty-nine and one-half fe The weight of the train was approximately thirty-two and o half tons. Just as the plaintiff's wagon was over the rails the driveway, it was struck by the forward rock car, and t plaintiff was thrown out and seriously injured. The wag was thrown forward to the left hand, but the horse on the rig apparently was not touched. The car itself was derailed. T train pushed it along about twenty-five feet before it stopp

The plaintiff claims that the train was traveling at the r of at least sixteen miles an hour, while he himself was going the rate of not more than two or two and a half miles an ho The defendant claims that the train was moving only from to eight miles an hour, and that the plaintiff drove his ho down the driveway at a quick trot, say six miles an hour, slo ing somewhat as he approached the track.

Beyond an estimate of the speed at which the train was m ing several hundred feet before the driveway was reached, t plaintiff introduced no direct testimony respecting the mo ments of the train. But the defendant's witnesses, the trai men, testified in effect that the train had reached a point fi or sixty feet from the driveway, when the plaintiff's horse a peared from behind the Shepard house, going toward the tra at a trot, that the brakeman on the front end of the front c instantly shouted and signaled to the motorman to stop, a that the motorman at once reversed the action of the motor, t effect of which was to reduce the speed of the train so sudde 153 that the front brakeman was thrown from the car, a this, he says, was at almost the same instant that the car stru the wagon. He also testified that the collision occurred bef he had time to set his brake, the chain of which was slack the time. The witnesses also testified that the gong on t motor car was ringing, and had been ringing for several hu dred feet back. They estimated the speed of the train at fr six to eight miles an hour, and testified, that by reversing t motor, the most efficient process known, the train could stopped in from seventy-five to one hundred feet.

was upon the plaintiff to show that his injuries
the negligence of the defendant or its servants,
ant of due care on his part contributed to the
e himself was guilty of contributory negligence,
inct and later negligence of the defendant was
cause of the injury: Atwood v. Bangor etc. Ry.
99, 40 Atl. 67. The defendant contends that it
anifest that the plaintiff has not proved any one
ial propositions that the court is required to set
le, to prevent a miscarriage of justice.
defendant or its servants guilty of negligence?
question more accurately, were the jury justified
n guilty? In finding them so, is their conclu-
bly wrong? The court is not required, or even
et aside a verdict merely because the jury came
n different from that to which the court would
he jury have the right for themselves to deter-
ibility of witnesses, to determine how far their
e, and from the truth of statement thus ascer-
e all legitimate inferences, and unless their con-
lpably wrong, their verdict cannot be disturbed.
ant had a lawful right to operate its railway in
here it was placed, and to run its cars singly, or
n its track, but it was its duty to do so, having
the safety, not only of travelers upon the street,
who might have occasion to cross the track in
om the yards of houses situated along its rail-
ed at which a car or train [154] may properly be
of control over it and the degree of watchfulness
sed upon those in charge, must depend to some
he surrounding conditions, such as the nearness
o the side of the street, and to the houses, the
persons driving out from the yards, and whether
are so situated that persons driving out over
or learn of the approach of cars in season, with
void collision. The defendant and its servants
assume that all such persons would themselves
ercise of ordinary care. While as was said in
Lewiston etc. Ry. Co., 89 Me. 593. 36 Atl. 1057,
t-cars have in a qualified way at least the right
inst persons on foot or traveling with carriages
the same manner as ordinary steam railroads
think it is only "in a qualified way." The move-

ments of their cars and trains are more easily and quickly co trolled than are those of steam railroads. The speed at whi they may properly travel along the highways is much less th the ordinary speed of steam railroads. Instead of a right way exclusive except at crossings, they exercise their right way in a public thoroughfare, to which many people must ha access from their houses. And this access to the highway mu in many cases, as in this, be had across the railway trac "Travelers with teams and proprietors of street-cars still ha concurrent rights and mutal obligations": Atwood v. Bang etc. Ry. Co., 91 Me. 399, 40 Atl. 67.

In fine, it was the duty of the defendant to this plaintiff the time in question to use due care, in view of apparent da gers, and of those which might reasonably be expected, so regulate the speed of its cars, so to have them under contr and so to be on the lookout for a team about to cross the trac that the plaintiff, if he was himself in the exercise of due ca should not be put in jeopardy. We do not mean to be unde stood as saying that a street railway company must stop slacken the speed of its cars every time a person is seen approach the track with apparent intent to cross it. It m properly be assumed that the traveler, if far enough away cross safely, will continue his movements and cross in front the car, or if not far enough away, and if warned of the a proach of the car, that he will stop and let the car pass fir The person in [155] charge of the car must exercise due care a judgment, and the movements of the car must be regulat with reference to the apparent situation: Tashjian v. Worcest etc. St. Ry. Co., 177 Mass. 75, 58 N. E. 281. If it be appare that a collision is likely to occur, it is the duty of the serva in control of the car to be ready to use, and to use, if necessa and when necessary, all practicable means to prevent it. Not ing less is due care.

Now to apply these general propositions of law to such co clusions of fact as we think the jury were warranted in findi in this case. In doing this, we must, as in all cases upon m tion for a new trial, take those conclusions most favorable the verdict, provided the jury were justified in finding the We think that the jury might have found properly that the tr of cars was running much faster than six or eight miles hour, perhaps as fast as sixteen miles an hour, and that pla tiff was traveling at no greater speed than two or three mi an hour. If so the plaintiff's horse came within the range

fendant's brakeman when he was more than two
listant from the driveway. In such case it was
e brakeman to use due care in keeping watch of
of the horse. Nevertheless the jury might have
e brakeman did not in fact discover the horse
ne track until the train was only fifty or sixty
crossing, when it was too late to stop the train
the crossing. The jury might have found that
taken to reverse the motor until the forward car
ossing. They might have found that to run a
s fast as this one was run, with such momentum
d, with slack brakes, in such proximity to the
and driveway, was dangerous, and that in doing
nt was negligent. They might have found, as
later, that while the plaintiff was driving toward
rently ignorant of the approach of the train, the
vant whose duty it was to watch, had a full op-
ee him more than two hundred feet away, and
failed to discover him until fifty feet away, when
n time to set his brake before the collision. They
und that the motor was not reversed as quickly
to have been after the plaintiff was discovered.
se conclusions were warrantable, and we think
annot be said that the verdict of the jury estab-
gligence of the defendant was so far unmistak-

plaintiff guilty of contributory negligence? We
nonstrable that he was. He says that upon pass-
of the house, he leaned forward, looked to the
no car and heard no bell or gong. From all the
ne case, aided by photographs which witnesses on
represent the situation correctly, it is clear that
the corner of the house could have seen the track
hundred feet distant, and the body of a car a
ce still. It is argued that his vision was inter-
the train was passing behind the trees near the
ph pole, about two hundred feet north of the
that this accounts for his not having seen the
e think the evidence shows clearly that at no
entire train of three cars and motor, all fifty-
half feet in length, have been hidden by the trees,
was no time after the train first came in sight
Burgess house that the cars or some of them were

not in plain sight to a person looking from the corner of t
Shepard house. If we take the estimate of speed, both of hi
self and of the train, as contended for by the plaintiff, he w
not be aided. He says his horse was walking. His coun
urge that the speed should not be estimated as greater th
two miles an hour. We cannot see how it could be less, and
more it would only show that the train was still nearer than
contends. His claim is that the train was traveling at the ra
of at least sixteen miles an hour. If so, the train was traveli
eight times faster than he was. While he was going the twen
feet to the railway, the train would have passed over one hu
dred and sixty feet. In other words, when the plaintiff was
the corner of the house, the head car of the train was one hu
dred and sixty feet from the crossing. It was in plain vie
with nothing to obstruct vision, except one trolley pole.
we assume that the train was going at the rate of twenty mil
an hour, it was traveling ten times faster than the plaintiff, a
would have been two hundred [157] feet from the crossing wh
the plaintiff says he looked. But at two hundred feet the fo
ward cars at least must have been in plain view of the plainti
For the train to have been beyond the sight of the plaint
when he says he looked, it must have been traveling more th
thirty miles an hour, in order to reach the crossing when
did. But there is nothing in the case which warrants any su
estimate of speed. If the train was traveling at a speed l
than sixteen miles an hour it must have been still nearer t
crossing when the plaintiff came by the corner of the house.

Coming back to the evidence in the case, and taking the co
tentions of the plaintiff's counsel as to speed, we are forced
one of two conclusions—either that the plaintiff, if he look
for cars, saw the train less than two hundred feet away a
moving toward the crossing; or that he did not look at all
the north. We do not think it possible under the given con
tions that he could have looked, as he says he did, without s
ing the train, and it seems incredible, if he looked and saw
train, that he would have proceeded in the manner he did.
our view it is immaterial which horn of the dilemma is the t
one. The plaintiff's conduct, his sitting back on the seat
the wagon where he could not see the track, his driving a
walk as he says right in front of the coming train, his appar
indifference to the train, all point to the conclusion that he
not aware of the proximity of the train, as he would necessar
have been if he had looked.

rule that a traveler must look and listen before
a railroad crossing has been held not applicable
oads (Fairbanks v. Bangor etc. Ry. Co., 95 Me. 78,
Warren v. Bangor etc. Ry. Co., 95 Me. 115, 49
ll it is necessary that a traveler approaching a
d crossing is bound to exercise some care to avoid
llision. He must exercise ordinary care, the care
ily prudent man, in view of all the existing condi-
nust take into account the probability of cars be-
he time, and the opportunities for observing them.
ve regard to his own speed, and must take some
apparent speed of the approaching car, if seen.
essarily negligence for a traveler to cross a track
n approaching car, even if he has [158] misjudged
and speed: Coleman v. Lowell etc. Ry. Co., 181
N. E. 402; Driscoll v. West End St. Ry. Co., 159
4 N. E. 171. Whether a traveler in such a case is
pends upon the facts in that case. But he must
care and judgment about it. He cannot sit under
t look, or if he looks, not see a car plainly before
have no care whatever, and then say he has ful-
asure of the law.
iff owed it to himself and to the defendant to ex-
able care to anticipate and avoid a collision. If
saw the train of cars approaching the crossing,
hundred feet away, as we think he must have done
and then settled back into his seat out of sight of
d drove onto the track at a walk, without taking
observe the further approach of the cars, it was a
eeding on his part, and we think it impossible to
was not negligent.
ner hand, if he drove out of the yard without look-
rtaining in any way whether cars were near, or
g any act or employing any sense in an endeavor
whether crossing the track would be safe or other-
ink he was negligent. Upon this hypothesis the
hat the plaintiff did not see, but that he sat back
ver of his wagon where he could not see. He was
entive, for he did not know of the train at all until
of collision. He did not even hear the buzz of
y which must have been audible at some distance
ive ear. It is no answer to say that the plaintiff
in his inattention by the fact that no regular car

was due there at that time, for it appears that the plaintif knew that the defendant was running trains of lime-rock cars These trains were run at irregular times—sometimes before a passenger, sometimes after—and sometimes, with a greater interval, between regular cars. And in any event the defendant had the right to run cars when it chose, and it was the duty of the plaintiff to exercise some care to look out for them. He could not be entirely inattentive.

3. It being demonstrably clear in our judgment that the plaintiff was guilty of contributory negligence, the verdict in his favor is [159] wrong and must be set aside, unless it appears further that after the plaintiff's negligence, and independent of and distinct from any prior negligence of its own, the defendant was negligent, and that this negligence was the proximate cause of the plaintiff's injury. In other words, the plaintiff must show that, at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be proximate cause of the injury. If the evidence justifies that conclusion, we must assume that the jury adopted this view, for in no other way can the verdict be reconciled with law.

As already stated, in the consideration of the defendant's negligence, we think the jury were authorized to find that during the whole time the horse and wagon of the plaintiff were passing from the corner of the house to the track, they were in plain sight of the brakeman on the front car of the train; that the plaintiff's horse was walking slowly, while the train was moving rapidly; that the plaintiff himself was out of sight, a of the time, and gave no sign that he was aware of the approach of the train. And if after the brakeman, whose duty it was to watch as well as to brake, came in sight of the team, he saw the team approaching the track, and saw that the driver was apparently negligent, inattentive or ignorant of the train, neither stopping for the train to pass, nor apparently endeavoring to cross before the train and if at such a time and under such conditions there was apparent danger of a collision by reason of the plaintiff's negligence, and if there was then time to stop the train, it was unquestionably the duty of the brakeman, then by signaling, and by braking, to stop the train.

But even if the brakeman, seeing the situation, failed reasonably to take the necessary steps to prevent a collision which

ly not only very likely to happen, but all the more pen, and which probably would happen, because of negligence or ignorance of the plaintiff, was his roximate cause of the plaintiff's injury? Was his that respect subsequent to and independent of the ntributory negligence? [160] We are constrained to as not. It was contemporaneous, not subsequent. o produce the result in connection with the plainnce, and not independently of it. The plaintiff's tively continued from the corner of the house to collision. It was operative to the last moment uted to the injury as a proximate cause. It is case of one who by his own prior negligence ut himself in a position of danger, as in Atwood c. Ry. Co., 91 Me. 399, 40 Atl. 67, and Ward v. Ry. Co., 96 Me. 145, 51 Atl. 947, in which cases n is well illustrated. The plaintiff not only neghimself in a place of peril, but continued neglive on to the catastrophe until it happened. The the doctrine of prior and subsequent negligence ime principle is not applicable when the negligence iff and that of the defendant are practically simulwas so stated, and the distinction was pointed v. Maine Cent. Ry. Co., 96 Me. 145, 51 Atl. 947, urt used this language: "It is not enough that t might by the exercise of due care on his part the consequences of the plaintiff's negligence when nce is contemporaneous with the fault of the det if the plaintiff's negligence is so remote as not imate cause contributing to the injury, then a delure to exercise due care to avoid the consequences tiff's earlier and remote negligence when by the uch care they could have avoided, will render the able": Rider v. Syracuse etc. Ry. Co., 171 N. Y. E. 836, 58 L. R. A. 135; Fritz v. Detroit etc. Ry. ch. 50, 62 N. W. 1007; O'Brien v. McGlinchy, 68

r new trial sustained.

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out to Cross a Railroad track is ordinarily held to the ng and listening for approaching trains: Passman v. tc. R. R. Co., 68 N. J. L. 719, 96 Am. St. Rep. 573; Weller . R. R. Co., 164 Mo. 180, 86 Am. St. Rep. 592; Smith v. R. Co., 70 N. H. 53, 85 Am. St. Rep. 596; Guhl v. Whit. 69, 83 Am. St. Rep. 889. As to whether this rule ap-

plies to street railways, see McCracken v. Consolidated Traction Co. 201 Pa. St. 378, 88 Am. St. Rep. 814; Evansville Street R. R. Co. v Gentry, 147 Ind. 408, 62 Am. St. Rep. 421; Hall v. Ogden etc. Ry Co., 13 Utah, 243, 57 Am. St. Rep. 726; Consolidated Traction Co. v Scott, 58 N. J. L. 682, 55 Am. St. Rep. 620; McGee v. Consolidated Street Ry. Co., 102 Mich. 107, 47 Am. St. Rep. 507.

An Engineer or Motorman may assume that persons approaching o near the track will not recklessly expose themselves to danger by at tempting to cross the track in front of the approaching car or train Green v. Los. Angeles etc. Ry. Co., 143 Cal. 31, 101 Am. St. Rep. 68 Holdridge v. Mendenhall, 108 Wis. 1, 81 Am. St. Rep. 817; Piskorowsk v. Detroit etc. Ry. Co., 121 Mich. 498, 80 Am. St. Rep. 518. Circum stances may arise, however, when he has no right to proceed upo an assumption, and when, if he does, and injuries result, the railwa company will be liable, notwithstanding the contributory negligenc of the injured persons: Harrington v. Los Angeles Ry. Co., 140 Cal 514, 98 Am. St. Rep. 85, and cases cited in the cross-reference not thereto.

STATE v. DORAN.

[99 Me. 329, 59 Atl. 440.]

AN INDICTMENT in the Language of the Statute is not Suffi cient, if such statute fails to set out the facts constituting the offens sufficiently to apprise the defendant of the cause or precise natur of the charge against him. (p. 280.)

INDICTMENT, When must Set Out the Facts.—Where a mer generic term is used, or where the words of a statute in their general ity may embrace cases which fall within the terms, but not withi the spirit or meaning thereof, the specific facts must be alleged t bring it within the inhibitions of the law. (p. 280.)

ATTEMPT to Commit a Crime.—To constitute an attempt t commit a crime, there must be something more than mere intentio or preparation. There must be some act moving directly toward th commission of the offense after the preparations are made. (p. 280.)

AN INDICTMENT for Attempting a Burglary must not onl allege the attempt and intent, but it is essential that it should als allege the overt acts relied upon and constituting the attempt. (pp 280, 281.)

INDICTMENT for Attempting to Commit a Crime, When In sufficient.—An indictment charging that the defendant feloniously willfully and maliciously did attempt to break and enter a car fo the purpose of committing a felony is insufficient, because it neithe specifies the particular felony attempted to be committed, nor other wise apprises the defendant of the specific offense which it is claimed he intended to commit. (p. 281.)

AN INDICTMENT for an Attempt to Commit a Crime must Specify the particular felony intended, but it need not be set out a fully and specifically as would be required in an indictment for th actual commission of such felony. It is ordinarily sufficient to stat the intended offense generally, as by alleging an intent to steal o commit the crime of larceny, rape or arson, etc. (p. 281.)

Emery, county attorney, for the state.

Dwyer, for the defendant.

TEHOUSE, J. It is alleged in the indictment fendant "with force and arms the car numbered e Boston and Maine Railroad . . . . feloniously, l maliciously did attempt to break and enter for of committing a felony." The jury returned a ilty, and the defendant moved in arrest of judg- other reasons, "because no [331] specific offense aws of this state is alleged against the said Doran tment, and that no judgment could be rendered dict in said court." The motion was overruled by judge, and the case comes to this court on excep- ruling.

ment appears to be founded on section 9 of chapter Revised Statutes, relating to "attempt to commit d section 8 of chapter 120 of the Revised Statutes, f the offense which the defendant was charged ing to commit. Section 9 of chapter 132 provides er attempts to commit an offense, and does any- it, but fails, or is interrupted or prevented in its hall be punished as therein provided; and section 120 declares that "whoever, with intent to commit aks and enters a . . . . railroad car of any kind, n which valuable things are kept," shall suffer the in specified.

from a comparison of these provisions with the the indictment, that only the general terms of the been employed to state the charge against the de- with respect to the "attempt" to commit the of- e "felony" which he intended to commit. The in- tains neither a description of the overt act done d in attempting to commit the crime charged, nor n of the particular felony which the defendant is attempting to commit, after breaking and enter-

offense is created by statute and the facts con- are fully set out, it is undoubtedly sufficient to fense in the language of the statute without further 1 Bishop's Criminal Procedure, sec. 611. But inal prosecutions the accused shall have a right mand the nature and cause of the accusation":

Me. Const., art. 1, sec. 6. He has a right to insist that t facts alleged to constitute a crime shall be stated in the i dictment against him with that reasonable degree of fullne certainty and precision requisite to enable him to meet t exact charge against him, and to plead any judgment whi may be rendered upon it in bar of a subsequent prosecution f the same offense. [332] Hence if a statute creating an offen fails to set out the facts constituting it sufficiently to appri the accused of the precise nature of the charge against him, more particular statement of the facts will be required in t indictment. "And where a mere generic term is used, or whe the words of the statute by their generality may embrace cas which fall within the terms but not within the spirit or mea ing thereof, the specific facts must be alleged to bring the d fendant precisely within the inhibition of the law": 10 Enc of Pl. & Pr., p. 487; Wharton's Criminal Pleading and Practic sec. 220. Indeed, it is an elementary rule of criminal pleadi that every fact or circumstance which is a necessary ingredie in a prima facie case of guilt must be set out in the indic ment.

With respect to indictments for attempts to commit offens Mr. Bishop says: "An attempt is an intent to do a particul criminal thing with an act toward it falling short of the thi intended (1 Bishop's Criminal Law, sec. 728), and on pri ciple we see that we must set out the act which was committe and the specific intent which accompanied it": Bishop's Stat tory Crimes, sec. 394; 2 Bishop's Criminal Procedure, secs. 1, 92 Bishop's Directions and Forms, sec. 100. In 2 Wharton's Crim inal Law the author says: "'Attempt' is a term peculiarly i definite. It has no prescribed legal meaning. It relates from i nature to unconsummated offenses. . . . . Attempts may b merely in conception or in preparation, with no causal connectio between the attempt and any particular crime. . . . . In an i dictment for an attempt it is essential to aver that the defenda did some act which directed by a particular intent, which mus be averred, would have apparently resulted in the ordinary an likely course of things in a particular crime": 2 Wharton Criminal Law, secs. 2703, 2705. To constitute an attemp there must be something more than mere intention or prepar tion. There must be some act moving directly toward the com mission of the offense after the preparations are made: Peopl v. Young, 122 Mich. 292, 80 Am. St. Rep. 582, 81 N. W. 11 "An indictment for an attempt to commit burglary must n

the attempt and intent, but it is essential that it
the overt acts relied upon as constituting the at-
Cyc. of Law & Pr., p. 225. See, also, 3 Ency. of Pl.
9, and cases cited.

, as already noted, the indictment fails to specify
ar felony which, it is alleged, the defendant in-
mmit. This is another fatal defect. The word
not the name of any distinctive offense. It is a
employed to distinguish certain high crimes, as
bery, rape, arson and larceny, from other minor
as misdemeanors. The averment that the defend-
d entered the car for the purpose of committing a
y failed to apprise him of the specific offense which
d he intended to commit. Whether it would be
the state that he intended to commit murder, or
rape, or larceny, he is not informed. Upon the
an indictment he was liable to be oppressed by the
of evidence which he could not anticipate or be pre-
t. The authorities are substantially unanimous in
e proposition that such an allegation is wanting in
and certainty required by the constitution and
criminal pleading. "Though in burglary and
use-breaking the intent, as defined by the law, is
mmit a felony, it is not sufficient in the indictment
se general words, but the particular felony intended
cified": Bishop's Criminal Procedure, 1, sec. 527,
142. See, also, 3 Ency. of Pl. & Pr., p. 772; 6
& Pr., title "Burglary," 217, and cases cited; Whar-
al Pleading and Practice, sec. 163a.

all the authorities substantially agree that it is
order that the charge may be certain, to specify
ar felony intended, they are not in harmony re-
degree of particularity required in setting out the
se. According to the great weight of authority,
well as upon sound reason, the ulterior felony in-
not be set out as fully and specifically as would be
an indictment for the actual commission of such
ishop's Criminal Procedure, sec. 142. It is ordi-
ent to state the intended offense generally as by al-
tent to steal, or commit the crime of larceny, rape
Such is the rule in Massachusetts. In Common-
herty, 10 Cush. 55, the court say: "From the very
e case, in many instances, the charge in its formal

details could not be given. Suppose the alleged 334 inte were to commit larceny, but of what particular goods, or t property of what particular individual, it could not be know unless the theft was actually perpetrated. A general intent steal goods would complete the offense, and the averment such intent without more is sufficient": Josslyn v. Commo wealth, 6 Met. 239. Nor is it necessary under our statutes, the case of an alleged intention to commit larceny, to aver th the property intended to be stolen exceeded one hundred dolla in value. By section 1 of chapter 121 of the Revised Statut the larceny of property less than one hundred dollars in val is punishable by "imprisonment for not more than two years and is therefore a felony under our statutes. By section 10 chapter 132, and section 3 of chapter 136, of the Revised St utes, the term "felony" is made to include every offense "pu ishable by imprisonment . . . . for the term of one year more": See State v. Goddard, 69 Me. 181.

The indictment being clearly insufficient for the reaso above set forth under the third specification contained in t defendant's motion, it is unnecessary to consider the causes a signed in the first and second specifications.

Exceptions sustained. Motion sustained. Judgment a rested.

An Indictment following the language of the statute is general sufficient: Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, and cas cited in the cross-reference note thereto; State v. Williamson, Utah, 248, 83 Am. St. Rep. 780. This is not true, however, if t statute does not contain all the essential elements of the crim State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403. See, to Meadowcraft v. People, 163 Ill. 56, 54 Am. St. Rep. 447; monograph note to State v. Campbell, 94 Am. Dec. 253-258.

An Attempt to Commit a Crime involves a guilty intent, but it al implies something more than a mere intention to commit the crim The law will not punish a criminal intent, until some overt act done in the endeavor to carry out the previously formed intentio See the monographic note to People v. Moran, 20 Am. St. Rep. 7 As to what constitutes such an act, see State v. Mitchell, 170 Mo. 6 94 Am. St. Rep. 763; People v. Sullivan, 173 N. Y. 122, 93 Am. Rep. 582; People v. Gardner, 144 N. Y. 119, 43 Am. St. Rep. 741.

v. BOSTON AND MAINE RAILROAD CO.

[99 Me. 338, 59 Atl. 532.]

ERMEDIATE Carrier is Liable to a Shipper for any through its fault after the goods have come into its l the liability of the former carriers in the route n they have respectively transported across their lines he freight to the next connecting carrier. (p. 285.)

MON CARRIER may, by Agreement, Limit to a reason- s common-law liability, but not his liability for the f his own negligence. (p. 285.)

CTING CARRIER, Duty of, After Its Carriage was f a connecting carrier has transported goods over its ninus and has become unable to deliver them to the he duty still rests on it as a forwarder to exercise and diligence to prevent unnecessary loss to the goods necessary costs to the owner in storage or transporta- rwarder should exercise the same degree of care to r unnecessary expense that a prudent owner would in the same situation. (p. 286.)

NECTING CARRIER Unable to Deliver Goods to the ed Carrier is Under the Duty of at once notifying the signee, and the failure to give such notice will render able for any loss or injury resulting therefrom. (p.

CTING CARRIER, When may not Select Another than Route.—If a connecting carrier is unable to deliver ext connecting carrier, and can properly care for and il the shipper can be communicated with, it is not ecting another route without notice and instructions per. (pp. 286, 287.)

NECTING CARRIER, Finding Itself Unable, on Ac- rike to Deliver a Shipment of potatoes to the next rier, should communicate with the shipper, and, if ommunication, it selects another carrier and forwards creased cost, it is liable to the shipper therefor, if he posed of his property where it was, had he been given opportunity to do so, and thus save himself from such (p. 287.)

her, for the plaintiff.

d A. W. Madigan, for the defendant.

ELL, C. J. On March 1, 1902, the Bangor and ailroad Company received of the plaintiff a car- es to be transported over its own and connecting ivered to a consignee in Philadelphia; and on received from the plaintiff two other carloads of igned to the same person in Philadelphia, for the

same purpose. The route designated by the shipper for t three cars was by rail to Boston, and from Boston to P adelphia by the Boston and Philadelphia Steamship Comp this designated route being plainly shown by this languag the bill of lading, or shipping receipt, given by the initial rier: "Route via Boston and Philadelphia Steamship C pany." The same language being contained in each of three shipping receipts. It is not claimed that there was ambiguity whatever as to the route chosen by the shipper thus designated in the shipping receipts. These cars were transported by the initial and an intermediate carrier and livered to the defendant, a common carrier, at Portland, point of intersection. The defendant there received these t carloads of potatoes and transported the same to its termi in Boston; the first car arriving on March 7th, and the o two on March 11, 1902.

At the time of the arrival of the last two cars in Boston a eral strike of teamsters and freight handlers existed which c menced on March 10th and continued until about March 1 and this strike was of such an extent that, as may be conce it became impossible, or, at least, impracticable by the exer of reasonable diligence, for the defendant to transfer t potatoes and deliver them to the next designated connecting rier, the Boston and Philadelphia Steamship Company. Th upon the defendant, without notifying either the consigno consignee, either by mail, telegraph or telephone, althoug appears there were ample means of communication, both mail and by wire, delivered these potatoes on March 11th the Metropolitan Steamship Company, by which they transported to New York, delivered to the Pennsylvania R road Company, [341] and from them transported by that c pany by rail to Philadelphia, where they were delivered to consignee. The cost of transportation by this route to plaintiff was ninety-one dollars and thirty-one cents, for three carloads, more than it would have been if they had transported by the route chosen by the shipper and pla designated in the shipping receipts. The plaintiff, having this extra cost of transportation under protest, seeks to rec that amount in this action, which comes to the law court u a report of the evidence.

Independently of any stipulation in the contract limiting liability, the defendant would unquestionably be liable for loss to the plaintiff caused by its failure to forward the g

ated route. The defendant's contract, by virtue
ance of these cars with the route designated, was
them over its own line to Boston, and there to
to the next designated connecting carrier, and
e to do so, to the injury of the plaintiff in the
red to, it would be liable to the plaintiff for the
of transportation: Proctor v. Eastern R. R. Co.,
2. That the intermediate carrier is liable to the
ny loss which occurs through its fault, after the
me into its possession, and that the liability of the
rs in the route terminates when they have respec-
rted the goods over their lines and delivered them
onnecting carrier, is now almost universally estab-
s country.

ntract of shipment between the initial carrier and
contained various stipulations affecting the rights
s and limiting the liability of that corporation.
ations inured to the benefit of the defendant:
adian Pacific Ry. Co., 97 Me. 77, 53 Atl. 874. And
sly agreed in these contracts that the stipulations
plicable to each carrier over any portion of the
also well settled in this state, as well as univer-
country, that a common carrier may by agreement
asonable extent his common-law liability, but not
for the consequences of his own negligence: Morse
Pac. Ry. Co., 97 Me. 77, 53 Atl. 874.

ulations, so far as they affect this case, are as fol-
o carrier . . . . shall be liable for any loss there-
thereto, by causes beyond its control, or by floods
om any cause wheresoever occurring; or by riot,
oppage of labor. . . . . No carrier is bound to
roperty by any particular train or vessel, or in
particular market, or otherwise than with as rea-
atch as its general business will permit. Every
have the right, in case of necessity, to forward said
any railroad or route between the point of ship-
point to which the rate is given."

sume, for the purposes of this case, that for causes
ontrol, and without any fault upon its part, the
uld not for the few days commencing Monday, the
tending to Friday, the 14th, deliver these goods
ated connecting carrier at Boston, and the causes
inability in this respect were covered by the stipu-

lations above referred to. It is also undoubtedly true tha the time the goods were forwarded by another route, it was possible to tell with any degree of certainty how long the si tion caused by the strike would continue, or how soon potatoes could be delivered to and received by the steam line between Boston and Philadelphia. There is also no q tion but that these stipulations, especially the one to the e that the defendant, in case of necessity, had the right to ward the goods by any other railroad or route, were reason limitations. We come, then, to the question whether the fendant, under the circumstances of the case in acting forwarder only, acted with that degree of care and dilig that the law and the situation demanded, and whether suc case of necessity existed as justified the defendant in forw ing these goods by the much more expensive route withou any way communicating with the shipper, and without gi him any opportunity to give new and different instruction view of the exigency which existed.

In determining this question, we assume that the duty liability of the defendants as a common carrier had ce when these goods had been transported over its own line to terminus in Boston, and when it was unable to deliver then the next carrier because of the situation referred to: Planta No. 4 v. Hall, 61 Me. 517; but [343] the duty still rested u the defendant, as a forwarder, to exercise reasonable care diligence to prevent unnecessary loss to the goods, and to unnecessary cost to the owner in storage or transportat Such forwarder should exercise the same degree of care to vent loss or unnecessary expense that a prudent owner wo have in the same situation. This is a familiar principle wh may be frequently found stated in the decisions: Hooper Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211.

The gravamen of the plaintiff's complaint is, that this de tion in route was made by the sender without communicat with him and without giving him an opportunity to give instructions when, as claimed by him, if he had been infor of the condition existing, and had an opportunity to exer his discretion in this situation, he could have disposed of potatoes in Boston without any loss, and, in fact, at a pr It is undoubtedly a general rule that where the carrier is able to deliver the goods to the next designated carrier, and an opportunity to do so, it is his duty to at once notify shipper or consignee, and failure to give such notice will

iable for any loss or injury resulting therefrom. ds are thus held after failure or refusal of the carrier to receive them, it is the duty of the initial t once notify the shipper or consignee, as the case Cyc. 484, and cases cited. "But, where the goods erly cared for and held until the shipper can be ed with, the carrier will not be justified in selecting te, without notice to him and instructions from sville etc. R. R. Co. v. Odil, 96 Tenn. 61, 54 Am. 0, 33 S. W. 611. Some of the numerous cases to ect which might be cited are, The Convoy's Wheat, 18 L. ed. 194; Michigan Cent. R. R. Co. v. Mineral g. Co., 16 Wall. 318, 21 L. ed. 207; Peterson v. ed. 885; Inman v. St. Louis etc. R. R. Co., 14 Tex. 9, 37 S. W. 37; Johnson v. New York Cent. R. R. Y. 610, 88 Am. Dec. 416; Goodrich v. Thompson, 4.

v. Grand Trunk Ry. Co., 61 N. H. 579, a case lied upon by defendant, the carrier failed to give 344 inability to forward the goods by the convey- ated, but it was expressly found that "that such l not have avoided the loss, and that the plaintiff injury by reason of the defendant's agent." There- urt decided that: "Neglect to notify the consignee of route does not render the carrier liable for loss happening from delay in the delivery of the goods, e would not have avoided the injury." With which e entirely agree.

these rules to the circumstances of this case, we he defendant failed to perform its duty toward the not giving him an opportunity to prevent, if pos- argely excessive cost of transportation. No such isted as prevented the defendant from holding the il the plaintiff could have been communicated with, tions received from him. One of these cars was Heater Car and the other two were lined cars, as lled, all supplied with means of heating. In this e potatoes were not of such a perishable character that they should be sent forward before there was from the owner, because, by the exercise of slight state of the weather had required it, the potatoes been kept from any injury from the frost. The viation from the route selected by the shipper, with-

out awaiting instructions, was entirely unnecessary. As s by the court in Michigan Cent. R. R. Co. v. Mineral Sprin Mfg. Co., 16 Wall. 318, 21 L. ed. 297, "common fairness quired that at least he should have been told of the conditi of things there and thus left free to choose, if he saw fit, anot mode of conveyance," or given an opportunity to dispose of goods, if possible, without subjecting them to this large char in proportion to the value, for the transportation. And we satisfied, from the evidence in the case, that this extra c could have been prevented, and all loss to the plaintiff wou have been avoided if this notice had been given, and if the pla tiff had had an opportunity to dispose of his property where was.

Judgment for plaintiff for ninety-one dollars and thirty-o cents and interest from the date of the writ.

A Carrier Receiving Goods to be transported beyond the termi of its own line is bound not only to carry them safely over its o route, but to deliver them to the next succeeding carrier: See monographic note to Wells v. Thomas, 72 Am. Dec. 237; Lewis Chesapeake etc. Ry. Co., 47 W. Va. 656, 81 Am. St. Rep. 816; V natta v. Central R. R. Co., 154 Pa. St. 262, 35 Am. St. Rep. 8 Alabama etc. R. R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 1 As to when its liability is reduced to that of a warehouseman, wh the goods have reached the end of its line, see the monographic n to Denver etc. R. R. Co. v. Peterson, 97 Am. St. Rep. 95-99.

If Goods can be Properly Cared for and held until the shipper c be communicated with, a carrier is not justified in deviating from t original route and selecting another, because of a strike, witho notice to, and instructions from, the shipper: Louisville etc. R. Co. v. Odil, 96 Tenn. 61, 54 Am. St. Rep. 820.

INTERNATIONAL WOOD COMPANY v. NATIONAL A SURANCE COMPANY.

[99 Me. 415, 59 Atl. 544.]

INSURANCE.—A Condition that a Policy Shall be Void Without the Consent in Writing of the Insurer, the property sh be sold, is valid, but to avoid the policy the sale must be such passes title to the property insured. (p. 290.)

JUDICIAL SALE.—Until the Delivery of a Deed of real est sold at a judicial sale the title does not pass. (p. 291.)

DELIVERY OF A BILL OF SALE, What will not be Deem to be a.—Where a receiver is authorized to sell property, and sale is made and confirmed, with directions for him to deliver a

ment of the purchase price, any delivery of such bill in ch payment must be regarded as provisional only, and g the title to the property. (p. 291.)

ANCE—Condition Against Sale of Property—Effect of not Completed by Payment.—A condition in a policy declaring that it shall be void, if, without consent in inting, the property shall be sold, is not violated by a of the property and its confirmation, if payment of the e is not made and no bill of sale is executed. (p. 292.)

IAL SALE—Effect of Order Vacating Confirmation.—al sale and the entry of an order confirming it, the court vacate the sale and order of confirmation, and such rmines the status of the title as between the parties to the vacating order cannot be impeached collaterally by company for the purpose of showing that a sale had been e of the conditions of its policy thereby violated. (p.

Thompson, for the plaintiff.

Cornish and Norman L. Bassett, for the defendant.

BODY, J. This action is brought to recover the thousand dollars, the amount covered by policy of e issued by the defendant company upon the perty of the plaintiff company, consisting of mill d machinery on leased land located at Lakewood in of Aroostook, state of Maine. The case comes beurt on report.

plant was installed for the manufacture of veneer cessor of the plaintiff, and extensive improvements after the purchase by the plaintiff, so that it stood ks September 1, 1901, at one hundred and seventy- d four hundred and twenty-seven dollars.

wenty-ninth day of December, 1900, William W. Portland, Maine, was appointed receiver of the der proceedings in suit instituted by the stockie receiver, through an agent of the defendant com- the policy in suit and six others originally aggreum of thirty thousand dollars. On March 5, 1901. authority by decree of the court to sell the property nd make report of the sale to the court for con- On the sixteenth day of September, 1901, he sold insured at auction for seven thousand dollars to Duncan of Portland, Maine, who deposited the sum and dollars according to the conditions of the sale. nteenth day of September, 1901, the sale was conie court. On the same date the receiver executed

the bill of sale to Mr. Duncan. Duncan never went to t mill but the receiver continued in possession and operated t mill up to the 1st of November, 1901, when it was leased him and operated by his tenants until the ninth day of Nover ber, 1901, when the mill building and contents were entire destroyed by fire. The receiver furnished the defendant proof of the loss December 13, 1901.

Previous to the loss by fire, at the request of the receiv made to the agent who negotiated the policies, the total insu ance was reduced to fifteen thousand dollars and the policy suit was modified so as to cover four hundred dollars on t buildings, four hundred and sixty-six dollars and sixty-sev cents on the machinery and one hundred and thirty-three do lars and thirty-three cents on lumber and material.

417 Upon his application to the equity court the receiver w given permission to bring suit against the several insuran companies, and the suit under consideration was commenc April 3, 1902.

On the twenty-eighth day of November, 1902, on the pe tion of Duncan, the order and decree confirming the sale him were vacated and rescinded and the one thousand dolla paid by him to the receiver was ordered to be repaid.

The policy is in the Maine Standard form and contains t provision that it shall be void, "if without the consent in wri ing or in print of the company, said property should be sol or this policy assigned," etc. Our court has held that such provision is valid: Waterhouse v. Gloucester Fire Ins. Co., Me. 409. So the case depends primarily upon the legal effe on the policy of the receiver's sale and its confirmation by t court.

To avoid the policy under this provision the sale must such as passed title in the property insured: Orrell v. Hampd Fire Ins. Co., 13 Gray, 431; Pitney v. Glen Falls Ins. Co., N. Y. 6; Brabin v. Hyde, 32 N. Y. 519; Boston & Salem I Co. v. Royal Ins. Co., 12 Allen, 381, 90 Am. Dec. 151. The was no actual delivery of possession by the receiver to Dunca In cases of the sale of personal property between individu where there is no question in relation to the statute of frau or rights of subsequent bona fide purchasers, or of attachi creditors without notice, the title may pass without delivery the property: Dixon v. Yates, 5 Barn. & Adol. 313; Morse Sherman, 106 Mass. 430; Cummings v. Gilman, 90 Me. 52 38 Atl. 538. But the validity of the judicial sales depen

at different rules. By decree of the court the re-
thorized and empowered to proceed to sell all the
International Wood Company at public auction to
idder, giving such notice of the time and place
to the court should seem reasonable and proper.
ve specific directions as to the notice of sale, that
d be subject to the approval of the court, that the
d make report to the court for confirmation and
eeds subject to the further order of court. The
was held September 16, 1901, according to the
e, and the sale was made to Duncan, [418] he be-
st and only bidder. The receiver filed his report
d it was confirmed by a decree of the court which,
facts upon which it was based, concludes as fol-
ed, adjudged and decreed that said sale be ap-
onfirmed and that said William W. Mitchell, re-
horized and directed to make, execute and deliver
e F. Duncan all necessary bills of sale and assign-
ry said sale into complete effect, upon the pay-
by said Duncan of the amount of the purchase
g to the terms of sale." A bill of sale was pre-
ecuted by the receiver to Duncan on the day of the
which the evidence shows may have been handed
ut if so it was not retained, and no further pay-
purchase price was made by him. It is claimed
lant that thus everything had been done to entitle
to the property and the receiver to the purchase
e do not think that this is the legal result of the
The authorities hold that until there has been a
deed of real estate sold at a judicial sale the title
Slowhidsky v. Phenix Ins. Co., 53 Neb. 816, 74
Manhattan Ins. Co. v. Stein, 5 Bush (Ky.), 652;
ntinental Ins. Co., 92 N. Y. 51; Marts v. Cumber-
. Co., 44 N. J. L. 478. In these cases it may
at the converse would be true, that the title would
delivery of the deed and a compliance with the
the sale. In judicial sales of personal property
of instruments of conveyance is a part of the
the sales. The failure of the officer of the court
th statutory provisions or with the decree of an
ordering and confirming a sale would render it
Freeman on Void Judicial Sales, secs. 43, 44;
m, 36 Me. 573.

There is some conflict of testimony relative to the fact delivery of the bill of sale to Duncan. If made at all it m have been only provisional. It was not such a delivery as contemplated and directed in the confirmatory order. It to be made by the receiver simultaneously with the payment him of the price which he was to hold for further order of court. Such delivery only was authorized or could have legal effect to pass the title. This [419] conclusion would ne tive a complete sale; and a mere executory contract or incho sale resulting from the auction and the deposit of money the bidder would not make the policy void under the forfeit clause. The effect of the decree of the court vacating and scinding the order of sale may be briefly considered. In Wo ard v. Bullard, 27 N. J. Eq. 508, the court say: "The right the court of chancery to set aside sales made by its officers restrain the delivery of the deeds to purchasers cannot doubted upon the proper case made": Campbell v. Gardner, N. J. Eq. 423, 69 Am. Dec. 598. In Collier v. Whipple, Wend. 224, where the deed had been delivered by the recei to the purchaser the order of the chancellor for a resale, on peal to the court of errors, was affirmed. Mr. Justice Nels in delivering the opinion of the court, said: "As to the d it was taken subject to the jurisdiction of the chancellor o the sale."

The decree of annulment was based upon the finding as m ter of fact, that the sale of Duncan had not been complet that the title did not vest in him; and upon that ground money paid by him at the time of making his bid was orde returned to him. This certainly would determine the sta of the title between the parties to the sale, and we think validity of the decree cannot be impeached collaterally by insurance company in this case: Brande v. Bond, 63 Wis. 1 23 N. W. 101; Libby v. Rosekrans, 55 Barb. 202.

The plaintiff is entitled to recover the proportion of the l sustained which the sum insured by the policy in suit, one th sand dollars, bears to the whole amount insured therein, fift thousand dollars. The evidence shows that the loss excee the whole amount insured.

Judgment for plaintiff for one thousand dollars and inter thereon from February 11, 1902.

An Insurance policy is not avoided by a sale of the property fully consummated: Magoun v. Firemen's Fund Ins. Co., 86 Mi 486, 91 Am. St. Rep. 370; Hanover etc. Ins. Co. v. Brown, 77 Md.

p. 386. When the statute gives the debtor time for
d permits him to remain in possession during that
f property at execution does not avoid the insurance
v. American etc. Ins. Co., 149 N. Y. 382, 52 Am. St.

LANG v. MERWIN.

[99 Me. 486, 59 Atl. 1021.]

ING, What is.—It is not essential to gambling, under
f Maine, that both parties shall stand to lose by the
enough that one of them stands to lose or win by
95.)

ING—Nickel-in-the-Slot Machines.—A slot machine
customer drops a nickel, and thereupon receives, in
ive cent cigar, and may receive an additional number
r payment, is a gambling device. (p. 295.)

the requisite number of legal voters of the town
n against the tenant of a certain room to restrain
lding it to be used as a place of gambling. The
the following findings of fact: "The defendant
of a nickle-in-the-slot machine which he operated
tore. The machine, so far as necessary to describe
of a cylinder, in five sections, made so as to re-
aft. Upon the outer surfaces of the sections were
s of playing-cards. When the sections were at
s would be in sight. By pressing a lever the sec-
ade to revolve, and the mechanism of the machine
t the sections revolved at different rates of speed,
The points at which the sections would severally
combinations of cards which would thereby be left
ew was purely a matter of chance. The machine
y those who resorted to the defendant's store ac-
e following scheme: The player deposited a 'nickel'
f the machine and pressed the lever. The player
was entitled to a five cent cigar, and the defendant
I find, that he might select any five cent cigar
If three cards of a kind were exposed after the
d to revolve, the player was entitled to two ad-
rs; if a 'straight,' four additional cigars; if a
lditional cigars; if a 'full hand,' eight additional
ır of a kind,' ten additional cigars; if a 'straight

flush,' twenty-five additional cigars; if a 'royal flush,' fifty a tional cigars. The player had the right to exchange two cent cigars for a ten cent cigar. By this arrangement, player for five cents placed in the machine received the s returns that he would if he had paid five cents on the coun And he might receive more. If he received more at any p it follows that the defendant lost on that play, which loss could only recoup by the profit on the cigars sold thereby w the player won no extra ones. And the defendant expected make such profit by an increased sale of cigars through the of the machine. The machine was in operation on this p three weeks, and the defendant estimated the results as amou ing on the average to the sale of six five cent cigars for twe five cents." The justice dismissed the petition and the pl tiff appealed.

Butler & Butler, for the plaintiffs.

Forrest Goodwin, for the defendant.

488 EMERY, J. The defendant had in his cigar-stor slot machine of the kind, and operated in the manner, descri in the finding of facts by the justice of the first instance. is agreed by the parties that if using the machine in the mar described constituted "gambling" in the statutory sense of word, then the defendant's cigar-store was resorted to "gambling" within the purview of the statute upon which petition in equity is based: Rev. Stats., c. 22, sec. 1.

The word "gambling" as a legal term has been variously fined by courts and legal authors. By some of these de tions both parties to the transaction in question must stan lose by chance as well as to win. Judged by these definit the transaction in this case does not constitute gambling, s the operator does not stand to lose anything by chance but to win. By other definitions, however, it is not essential both parties should stand to lose by chance; it is enough if party stands to lose, or to win by chance. If such be the s utory meaning of the term then the transaction described constitute gambling, since the operator stands to win so thing by chance, and the cigar dealer to lose by chance. view of the conflict of authority the justice of the first inst dismissed the petition, practically pro forma, that the might have upon appeal an authoritative determination. task now is to ascertain in what sense, the narrow or the br

ambling" was used by the legislature in enacting

termining the sense in which the legislature used
in one chapter or section of its statutes may often
by considering the language of other chapters and
the same or kindred subjects. Referring to the
led "Gambling" (Rev. Stats. 126, sec. 1), we find
erson is forbidden to "permit any person to gamble
in any house, shop or place under his care or con-
ring to the chapter entitled "Offenses against the
, safety and policy" (Rev. Stats., c. 129), we find
0 that "every lottery, policy, policy lottery, policy-
heme or device of chance of whatever name or de-
ether at fairs or public gatherings or elsewhere,
in the interests of churches, benevolent objects or
prohibited." It would seem from these to have
ention of the legislature to prohibit every pecuniary
n which pure chance has any place. There are no
nitation or exception. To give effect to this in-
ould seem necessary to hold that the legislature has
m "gambling" in its broadest, most generic sense,
nding every species of game or device of chance.
e before us it is idle to assume, or concede, that the
ing his five cents into the machine may be doing
a means or mode of buying a five cent cigar. It
ny that the impelling motive is the hope of getting
for nothing. If the machine did not afford that
ould not be used. True, the cigar dealer sets up
to increase his trade and is recouped by that in-
ny losses, so that in the end he loses nothing, but
y arousing and stimulating the gambling propensity,
ropensity the legislature evidently seeks to repress.
t of chance is the soul of the transaction. The oper-
by chance to get something for nothing. The dealer
e will save him from giving something for nothing.
uniarily interested adverse to the other in a result to
ned solely by chance. To use the language of the
a gamble" which will win, and we have no doubt the
is "gambling" in the statutory sense of the word.
ity for the conclusion is needed, it is not wanting.
Willis, 78 Me. 70, 2 Atl. 848, in speaking of an
nt alleged to be a lottery, this court said: "However
y indirect or deceptive expression, the paper as a

whole discloses a lottery. If it were not so readers would n become buyers." So in the case at bar, however disguised t scheme or device, its essential element is that of affording chance to get something for nothing. If it were not so visito to the store would not use it. A like case in principle Horner v. United States, 147 U. S. 449, 12 Sup. Ct. Rep. 40 36 L. ed. 126. The Austrian government issued bonds, and induce purchase of them by the [490] public it obligated itsc to pay not only the principal and interest of each bond b also such additional sum, if any, as the number of the bor might draw in a lottery established for that purpose. The fa that the purchaser of the bond presumably got full value f his money in the bond itself and did not stand to lose anythi by chance, was held by the court not to save the transactic from being a lottery. The element of lot or chance was in and that was enough. The two cases seem alike in principl The opinion of the court is elaborate and exhaustive, citi many cases. We deem a reference to that opinion and t cases cited therein all that is necessary by way of citation.

Decree below reversed. Petition sustained with costs. I junction granted.

A Slot Machine **is held to be a gambling device in Bobel v. Peop 173 Ill. 19, 64 Am. St. Rep. 64, and a lottery in Meyer v. State, 1 Ga. 20, 81 Am. St. Rep. 17; Loiseau v. State, 114 Ala. 34, 62 Am. Rep. 84.**

CASES

IN THE

RT OF APPEALS

OF

MARYLAND.

FARREN v. DAMERON.

[99 Md. 323, 58 Atl. 367.]

Warranty, Implied, When does not Exist.—Where the Opportunity of Examining the thing purchased, there warranty, in the absence of fraud or express warranty fit for the purpose for which it was bought. (p. 300.)

Implied Warranties Against Defects Which Subsequent-Where oysters are sold and delivered and the purchaser unity to inspect and does inspect them, and finds them rketable, the seller is not liable for defects which levelop, as where the oysters, after their acceptance, " or "bloody," and therefore unmerchantable. (p.

ok and Gans & Haman, for the appellant.

Mayo, for the appellees.

, J. The appellees were shuckers of, and dealers t Kinsale, Virginia, and the appellant (Burdette trading as J. S. Farren and Company), was a sters in Baltimore City. During the season of ellees sold shucked oysters to the appellant and at g of the season of 1901 they agreed to ship him he 334 season, of sizes known as "standards" and he price agreed upon was for so much per gallon ds" and "selects," respectively, in Baltimore. ipped in kegs furnished by the appellees and the ptied them into his own pails or vessels, and re-empty kegs. They were shipped by steamboats

which left Kinsale at noon on Monday, Wednesday and
day of each week, arriving in Baltimore early the next m
ing. They commenced shipping in October, and continue
ship by each trip until sometime in November, sometimes a
ping more than ordered and at others less. All of the s
ments were paid for excepting those of November 15th
18th, which were accepted by the appellant, but he refuse
pay for them because he claimed that those shipped on the 1
and 13th of that month, and received by him on the 12th
14th, afterward proved not to be merchantable, and the pa
to whom he sold them refused to pay for them because
were what are called "red," or "bloody" oysters. The ap
lees sued for those shipped November 15th and 18th, and
appellant claimed that he only owed the difference between
price of those and the deductions made by customers on
count of "red" or "bloody" oysters received by him on the 1
and 14th of that month, for which he had paid the appell
and claimed a deduction in the third count of his amen
plea of setoff. A demurrer to that count was overruled,
as the questions involved are raised by the prayers, and the
murrer was decided in favor of the appellant, it will not
necessary to make further reference to it. The case was t
before the court and resulted in a verdict for the plaint
The defendant excepted to the rulings of the court on
prayers and appealed from the judgment rendered on the
dict.

One of the appellees was a witness and testified that he n
heard of oysters turning red until his attention was called
it by the appellant, after the shipment of November 13th,
he did not know what caused it; that he did not know w
his firm bought all the oysters shipped to the appell
as they purchased them in the shells from dredge boats
came to their place. The agent of the appellant, who made
contract with the appellees, testified that the oysters were d
received at the appellant's place of business in Baltimore;
the time of the receipt they had been shucked were packed
barrels, properly iced and under his directions were taken
of the barrels, repacked in appellant's pails, properly iced
shipped to the Forest City Oyster Company at Cleveland, O
W. J. Gill of Toronto, Canada; Samuel Hagans of Colum
Ohio, and A. L. Barr of Davenport, Iowa; that he saw som
them in the barrels and as they were being transferred to
appellant's pails, and they were apparently in good condi

nerchantable oysters without any noticeable defects; fendant had been engaged in the oyster business for and was competent to pass on this question; that ness, in his years of experience in the oyster business ntly seen what was known to the trade as "red" or ysters; that the cause of such redness is not well but it gives them a red color and gives the liquor f blood. "That 'red' or 'bloody' oysters are unmer- ysters; that the redness is not always noticeable as oysters are shucked, and that in many cases it does for some days after the same are shucked, and that ively small number of the 'red' or 'bloody' oysters other oysters in a pail or other vessel will, in time, other oysters in said pail, so as to render the whole ereof absolutely unmerchantable." He also said redness in a cargo is discovered in time, it is possi- some of them by having them steamed, which pro- os the redness so that the good oysters can be se- the red.

llant also offered evidence tending to show that all shipped to the four parties above named, at that received from the appellees, and an agreed state- cts as to what they would testify to was read, in as shown that most of the oysters received by them he appellant at the times mentioned were unmer- being "red" or "bloody."

tended on the part of the appellant that under the es of the dealings between him and the appellees, n implied warranty that the oysters were merchant- vere free from latent defects. We do not under- be denied by the appellees that, if the oysters were ntable when received by the appellant, he was not ation to accept them, but they deny that they are for latent defects, such as complained of, which after they were received, inspected and accepted by nt in Baltimore. It is not claimed that there was on the part of the appellees, and there is nothing to hey knew of the defect when they shipped them, and, seen, the member of the firm who testified said he heard of this trouble with oysters until his attention to it by the appellant. Under the contract the e to be delivered in Baltimore and were actually so The appellant not only had the opportunity to do

so, but in fact did inspect them, and he wrote to the appelle on November 12th acknowledging receipt of those shipped o the eleventh, stating "stock and measure all right," and i closing check to cover indebtedness to date. On the 14th h acknowledged receipt of shipment of the 13th and said th stock to all appearances seemed to be all right, but he had ju received a telegram from a customer that part of the oyste which he had received the day before were red. Two of h employés testified that they were apparently in good conditio when they examined them in Baltimore.

The important question, therefore, to be determined i whether the implied warranty that the oysters were merchan able is to be so extended as to warrant their quality, so as t protect the appellant to the time they were delivered by hi to the purchasers from him, against a defect such as this con plained of. The general principles applicable to implied wa ranties have been so frequently announced by this court th 887 it seems almost useless to repeat them, but it may be we to recall some of them. As was said in Horner v. Parkhurs 71 Md. 116, 17 Atl. 1027: "Where the buyer has an opportu ity of examining the thing sold, there is no implied warrant in the absence of fraud or express warranty, that it shall be f for the purpose for which it was bought. In such cases th rule caveat emptor applies, by which is meant that unless th buyer sees fit to require a warranty, he takes upon himself th risk as to quality"; citing Osgood v. Lewis, 2 Har. & G. 51 18 Am. Dec. 317, Hyatt v. Boyle, 5 Gill & J. 110, 25 Am. De 276, and Rice v. Forsyth, 41 Md. 389. The appellant, ho ever, seeks to distinguish this case from those and others a nouncing a similar doctrine, on the theory that it only appli when the purchaser has had an opportunity to inspect speci existing chattels, and that it has no application to a case which one orders goods to be supplied and delivered to him a dealer in such articles. But conceding, as we do, that su distinction is recognized by the authorities, is the doctrine implied warranty to be carried so far as to make the vend liable for a defect such as this, which was not discovered un after the oysters were delivered, inspected, accepted a shipped to distant places? If, as the court below determin by granting the defendant's second prayer, it being a contr for future deliveries, there was an implied warranty that t oysters should be merchantable, it certainly had some lim There was a better opportunity to ascertain whether they we

e when they were received in Baltimore than there been if the appellant had gone to the appellee's iness and selected them there. The appellant required to accept them until they were delivered and he had the opportunity to inspect them, and only had the opportunity, but actually did inspect vay that was certainly as thorough, if not more so, d possibly have done at the appellees' place before d then accepted them as merchantable, which they vere, as both the appellant and the appellees had lieve, it is hard to see the necessity for or justice law that would make the appellees liable for defects sequently develop when it is conceded they would en if the appellant had inspected them before he hem. The theory of implied warranty of quality urchaser has relied on the judgment of the seller, no opportunity to see for himself, and ordinarily s so there is no implied warranty, for when there ortunity for the purchaser to inspect, and he does no reason for the law implying a warranty. In Parkhurst, 71 Md. 116, 17 Atl. 1027, there was a as to whether there was an express warranty of e, and after referring to that, the court said that of implied warranty had no application to the facts After saying what we have quoted above the court in this case if the defendant had an opportunity and testing the benzine before he used it, then, in of fraud or express warranty, it was no defense to hat it turned out to be inferior in quality to what it to be or what he wanted." There the time fixed was not before the purchase but "before he used ad the opportunity of inspecting and testing the

al rule is that when a manufacturer sells articles e known to him, there is a warranty against latent ing out of the process of manufacture. That is s presumed to know the defect caused by the way s made, and so if he knowingly uses improper ma- e manufacture of the article sold, but even then es differ as to whether he is liable for latent de- erials used which he could not have discovered by ligence, and it has been held in some cases that he iedly warrant against latent defects unknown to him

resulting from the unskillfulness in the work of some other ma ufacturer, or from the use of defective materials furnished others: 15 Am. & Eng. Ency. of Law, 2d ed., 1233. In the r cent case of Queen City Glass Co. v. Pittsburg Clay Pot C 97 Md. 429, 55 Atl. 447, we held that where the manufactur of clay pots, made by a secret process, sold some of them wi knowledge of what they were to be used for, [339] there was a implied warranty under the principle approved in Rice v. Fo syth, 41 Md. 403, that "Where a manufacturer contracts supply an article which he manufactures to be applied to particular purpose, so that the buyer necessarily trusts to t judgment or skill of the manufacturer, there is in that ca an implied term or warranty that it shall be reasonably fit f the purpose to which it is to be applied. In such a case t buyer trusts to the manufacturer or dealer, and relies on h judgment and not upon his own." As a reason for holding t manufacturer liable we said in the Clay Pot case that "It w impossible for the purchaser to know, by an inspection or othe wise, whether the various component elements had all be used, or, if used, whether they had been used in proper propo tions," etc. In 15 American and English Encyclopedia Law, 1235, the substance of what is quoted above from Rice Forsyth, 41 Md. 403, is said to be sustained by the weight authority, where a dealer contracts to supply an article in whi he deals to be applied to a particular purpose, but the auth adds: "This rule, of course, does not extend to cases where t purchaser and the seller have equal means of knowledge as the fitness of the thing sold for the purpose for which it sold"; and on page 1237 it is said: "The liability of a grow or producer of an article or commodity sold for a particul purpose is identical with that of the manufacturer of an ar cle or commodity so sold. This rule obviously has its limi It does not impute to the seller knowledge as to the qualiti or fitness which no human foresight or skill can attain, a raise an implied warranty in respect to them, when the vend and the purchaser are in equal condition as to the means knowledge, or the latter must understand from the nature the case that the information, experience and knowledge of t vendor are not superior to his own." This qualification is ve applicable to the case now before us. As we have seen, t member of the firm who testified for the appellees said he h never heard of red or bloody oysters before, while the app lant's agent was familiar with them. The appellant could n

e relied on the appellees' judgment as to whether
ters were free from this defect. If the appellant
could not detect the defect when they arrived in
rely the appellees could not have done so, before
them from Virginia. If it be true that they
of such defect, it is certain they never intended
gainst it, and if it was known to the appellant.
d to guard against it, he ought to have demanded
arranty.

to what we have said, we think it would be an
angerous extension of the doctrine of implied
apply it to such articles as oysters under the facts
The evidence offered by the appellant is that a
aving this defect may impregnate or affect all in
essel in which they are shipped. There is some
ding to show that the appellant did include some
s customers which were not purchased from the
that was the case, it may be that those sold by
were not so infected until brought in contact with
vere. What causes the trouble is not explained.
hat the redness is is not well understood. It is
wn that an oyster in which it afterward develops
e been entirely free from it when shucked. The
be drawn from the evidence that it may be, as
hat a few red oysters in a pail will in time affect
in that pail. Possibly the pails of the appellant
by the oysters of other dealers and produced the
t be a defect that may not develop until some days
shucked, and it is necessary to guard against loss
f it, the purchasers can protect themselves against
ng express warranties, but we are not willing to
doctrine of implied warranty as to make a vendor
h perishable articles as oysters for such length of
der such conditions as this record discloses. The
ed to sustain the appellant's theory that much re-
is that of Beer v. Walker, 46 L. J. C. P. 677.
rabbits that were shipped from Beer, in London,
in Brighton, were 341 accepted by Walker and
ward those in one of the casks were found by him
unmerchantable condition. An expression used by
that case, if approved, would not only make the
or such deterioration of quality as would result nec-
the transit to the purchaser, but even after that

time while he was shipping them to his customers. For reas we have given, we cannot follow that decision, if it can be c strued to apply to such facts as we have shown to be in record, which we do not think it does. Without deeming necessary to discuss the several prayers, we will affirm the ju ment of the lower court.

Judgment affirmed, the appellant to pay the costs.

The Principal Case is cited in the recent monographic note Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 624, on imp warranties in contracts of sale.

BRAUER v. BALTIMORE REFRIGERATING A HEATING COMPANY.

[99 Md. 367, 58 Atl. 21.]

PUBLIC STREETS—Respective Rights and Remedies of Owners and the Public.—The owners of lots abutting on streets permitted to encroach to a limited extent for the necessary tran tion of their business upon the primary right of passage of public, provided they do not unreasonably interfere with its exer but the right of the public to employ the streets for the purpos travel and transportation is the paramount one, and that of abutter to occupy them for other purposes is a permissive and ordinate one. (p. 308.)

PUBLIC STREETS—Right to Obstruct.—A Merchant or M ufacturer whose place of business abuts on the street of a popu city, may temporarily obstruct the sidewalk in front of his buil in the process of loading or unloading merchandise or the produc his factory, provided he does not unreasonably encumber the foot or interfere with the reasonable use and enjoyment of the adja property; but if the adjacent owner suffers special or pecuniary from the unreasonable obstruction of the public street, he can m tain an action for damages or file a bill in equity for an injunct if the nature of his damage is such as to make the latter form action appropriate. (p. 308.)

PUBLIC STREETS.—The Extent of the Right of an Abut Owner to Obstruct a Sidewalk in front of his establishment is to be determined by the necessity of his business, but by the pu convenience and the reasonable enjoyment by adjacent owner their property. (p. 308.)

PUBLIC STREETS, Unreasonable Use or Obstruction of, W is.—The maintenance of a platform three and a half feet in hei four feet wide, and fifty-two feet long, on a sidewalk adjoining abutting property owner's lot for the purpose of loading ice f his factory for several hours of the day on wagons standing at r angles to the platform and across such sidewalk, is an unreason use of the public street, which should be enjoined at the instanc the adjacent property owner. (p. 310.)

STREETS, Permission to Obstruct, When Unavailing. by the board of estimates of the use and obstruction in front of a public street cannot sanction such use for a continuous purpose to the injury of an abutting , when the authority of such board is limited to grant- the streets for "bow or bay windows, hitching-posts, , planting of trees, storm-doors, drains and drain-pipes, temporary or similar uses." (p. 311.)

STREETS, Limitations upon Control of.—It is not a Municipal Corporation to confer authority upon a to employ the public streets in any enterprise or oc- will defeat the primary purpose for which they were e public use. (p. 312.)

TION to Prevent Threatened Use of a Public Street.— endant admits that he intends to construct a platform nges in the grade and pavement of a sidewalk and to such sidewalk, the continuance of which would not be injunction may issue at the instance of an abutting without waiting until the actual commission of those)

cFarland and Emil Budnitz, for the appellants.

Smith, Alfred S. Niles and Oscar Wolff, for the

UCKER, J. The appellants own a lot of ground west corner of Eutaw and Barre streets, in Balti- ronting twenty-five feet on Eutaw street with a enty-six feet on Barre street. The appellee owns lot on the west side of Eutaw street, on which t of one hundred and four feet to Wayne street. reet it runs west one hundred and twenty-five or and thirty feet and then extends southerly in the ppellants lot to Barre street, on which it has an- f about forty feet.

et at this location is a wide thoroughfare running uth and it is much traveled by vehicles and pedes- eight track of the Baltimore and Ohio Railroad e center of the street on which cars stand to re- liver freight from and to the warehouses on the the street. The east side of the street contains freight warehouse of the railroad company and foot pavement on that side. The only sidewalk pedestrians along this portion of Eutaw street is e west side lying immediately in front of the lots e transactions out of which the present controversy e street is only eighteen or twenty feet wide and t exclusively by wagons being seldom traversed by

persons on foot. Barre street is sixty feet wide [374] but not much traveled. Neither of the last-named two streets any railway track on it.

The appellant's lot is improved by two small stores a dwellings fronting on Eutaw street. The appellants occu the one at the corner as a dwelling and retail liquor store, a rent the other one to a retail tobacconist.

The appellee, having erected on its lot a large building manufacturing ice and furnishing heat and power, applied the board of estimates for a permit to erect and maint upon the Eutaw street sidewalk, in front of that part of building immediately adjoining the appellant's lot, a platfo three and one-half feet high, four feet wide and fifty-two f long, for the purpose of loading the ice to be manufactured it into wagons, and also to remove the curb and lower the si walk in front of the platform so as to allow wagons to back against it over the sidewalk to receive their loads of ice. T board of estimates granted the permit asked for by the pellee allowing it to erect the platform and remove the cu and pavement from the sidewalk and the street in front of and replace them by a uniform pavement of vitrified brick, as to permit of the unobstructed approach by wagons from bed of the street over the sidewalk to the platform.

The appellants thereupon filed the bill in this case in c cuit court No. 2, of Baltimore City, asserting that the erecti and use of the proposed platform by the appellee would grea obstruct and endanger the public use of the sidewalk and div travel therefrom; and would also cause irreparable injury the plaintiffs by depriving them and their tenants of the c tom and patronage which they now enjoy or can reasonably pect to secure from persons using the sidewalk on that part Eutaw street. The bill also alleges that by reason of the lo tion of the plaintiffs' property and the nature of the busin conducted therein they will suffer an especial loss, differ from that sustained by the public generally, from the defe ants proposed action and prays for an injunction to prev the erection of the platform and lowering of the sidewalk the defendant.

[375] The court granted a preliminary injunction on the fili of the bill, but upon the coming in of an answer and the t ing of testimony it passed a final decree, dissolving the inju tion and dismissing the bill, from which this appeal was tak

It appears from the testimony of Mr. Tough, the gene

the appellee, who testified on its behalf that it has
ith a view to its own interest and advantage, but
view to causing the least interruption to travel ar-
construct its building as to deliver its entire out-
ver the proposed platform to wagons standing on
backed up against it, and that it may also use the
handling coal. It further appears from the testi-
same witness that the appellee intends to manu-
t one hundred tons of ice per day, which will fill
one-horse wagons or fifty two-horse wagons, and
require eight minutes to load and start each wagon;
horse and wagon backed up against the platform
d across the entire sidewalk, but if the horse or
turned at right angles to the wagon there would
of about two feet along the outside of the place
cupied by the sidewalk on which pedestrians might
t actually going into the bed of the street.

h also stated, both before the board of estimates
estifying in the case, that the bulk of deliveries of
proposed platform were expected to be made be-
hours of 2 and 6 A. M., but upon the appellant's
ring, when before the board of estimates, to with-
jections to the issue of the permit if upon its face
the use of the platform to those hours, the appellee
accept the permit in that form. This witness ad-
is testimony that ice would be delivered to custom-
r they called for it and there was other evidence in
ich satisfies us that the demand for ice would not
o that short portion of the day.

evidence in the record of witnesses who say that
requently seen the street in front of the property
consideration crowded with wagons and that at
congestion of traffic occurs there. It also appears
vidence that meat-packing establishments in the
d use an overhead steel trolley arrangement, for
heir meat across the sidewalk from the bed of the
e warehouses, which does not seriously interfere
e of the sidewalk by pedestrians.

ts have frequently been called upon to consider the
sitions controlling the use of public streets. The
the subject agree that the fundamental right to their
is that of the general public for passage over and
. In the exercise of this right persons employing

vehicles are primarily entitled to occupy the bed of the str while pedestrians have a similar priority of claim upon t sidewalk.

The owners of lots abutting on streets are permitted to e croach to a limited extent, for the necessary transaction of th business upon this primary right of the public provided th do not unreasonably interfere with its exercise. But it mu always be borne in mind that the right of the public to e ploy the street for purposes of travel and transportation is t paramount one and that of the abutter to occupy them f other purposes is a permissive and subordinate one: Rex Russell, 6 East, 427; Rex v. Jones, 3 Camp. 230; Callanan Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 26 Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 55 Halsey v. Rapid Transit Co., 47 N. J. Eq. 380, 20 Atl. 85 Davis v. City of Corry, 154 Pa. St. 602, 26 Atl. 621; Elliott Roads, sec. 20; Lake Roland Elevated R. R. Co. v. Baltimo 77 Md. 379, 26 Atl. 510, 20 L. R. A. 126.

A merchant or manufacturer whose place of business abu on the street of a populous city may temporarily obstruct t sidewalk in front of his building in the process of loading unloading his merchandise or the product of his factory, pr vided he does not in so doing unreasonably encumber the fo way or interfere with the reasonable use and enjoyment of t adjacent property. But if the adjacent owner suffer special peculiar loss from an unlawful obstruction to a public sidewa he can maintain a suit for damages or file a bill for [377] an i junction if the nature of his damage be such as to make t latter form of action appropriate: Flynn v. Taylor, 127 N. 596, 28 N. E. 418, 14 L. R. A. 556; Callanan v. Gilman, 1 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264.

The extent of the right of the abutting owner to obstru the sidewalk in front of his establishment is not to be det mined by the necessities of his business, but by the public co venience and the reasonable enjoyment by adjacent owners their property.

In Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. A. 556, where the suit was brought by the owner of adjace property against the defendant for obstructing the sidewalk, front of a saleratus factory owned by the latter, by havi trucks stand across it for several hours each day to load a unload, the court say: "While the defendant was doubtl careful to interfere with the rights of the public no more th

ry for the convenient transaction of his business
ilities he had he could not lawfully supply the de-
premises by virtually monopolizing the sidewalk for
s every day. As the court said in Rex v. Russell,
he 'could not legally carry on any part of his busi-
ublic streets to the annoyance of the public.' Nor
out the inconvenience of his own premises by tak-
public highway': Rex v. Jones, 3 Camp. 230.
articular use of a public street is a reasonable use
uestion of fact depending on all the circumstances
. . . . . While general welfare is promoted by
s such as the defendant carries on, and they
e interfered with for light or trivial causes, still
the public to the use of the sidewalk is paramount,
t so arrange his business as not unreasonably to
h it."

Roland Elevated R. R. Co. v. Baltimore, 77 Md.
510, 20 L. R. A. 126, this court, in upholding the
city of Baltimore in requiring the removal of one
railway tracks, which had been laid with its con-
it interfered with the reasonable and convenient
treet by the public, said: "The control of the city
ets is attended with the duty of preserving them
itimate purposes. [378] They are intended for the
eople over them on foot, on horseback and in vehi-
r occasions of business, convenience and pleasure.
npetent for the city to defeat the primary purposes
ey were dedicated to the public use. They are
d must be maintained as highways as long as they
existence."

v consider, in the light of these principles, whether
h the defendant intends to make of the sidewalk
ts factory is a reasonable one. In the first place its
tform three and a half feet high, will occupy two
l eight square feet of the public sidewalk from
rians will be excluded as effectually as if the build-
ere extended to cover up that much of the pave-
e next place the curbing will be removed and the
lf will be materially changed for the distance of
l one-half feet. It is well known that sidewalks
above the bed of the street and supported along
ide by curbing in order to protect those using them
croachment of vehicles and from the dirt and filth

which accumulate on the bed of the street by reason of t
uses to which it is applied as well as from the water whic
especially during rains, accumulates in and flows down the gu
ters lying next to the sidewalk.

The nature and extent of the appellee's intended use of t
platform and sidewalk for its private purposes in handling t
product of its factory makes it apparent that, even with t
use of such skill and expedition as it can reasonably expect
secure from its employés in that connection, the sidewalk
front of the factory will be practically turned into a loadi
yard for ice wagons during several hours of each day. It is ev
dent that this intended use of the sidewalk will not only o
struct passage over it, but will defile its surface with the dro
pings from the horses and the drippings from the ice wago
especially in warm weather to such an extent as to lead p
destrians to avoid the use of that portion of the street a
seek other avenues of passage. That this will cause especi
damage and injury to the retail business carried on in t
879 plaintiff's building immediately adjoining the platform
too plain for controversy. As was said by the court in Flyn
v. Taylor, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556, "d
version of trade inevitably follows diversion of travel."

While fully recognizing the wisdom and the importance
municipal prosperity of pursuing a liberal policy toward manu
facturing enterprises in order to promote their growth, we d
not think that the appellee should be permitted to erect o
maintain this platform upon the pavement in front of its prem
ises or to obliterate for its own convenience so considerable
portion of the sidewalk dedicated by condemnation to publ
use. This platform is intended to provide greater room fo
handling the ice and its erection will in effect constitute an ex
tension of the first floor of the factory over a considerabl
part of the sidewalk. The use to which the appellee admit
that it proposes to put the balance of the sidewalk for som
hours in each day would amount to a practical conversion o
it while being so used to a part of the factory premises. Th
appellee in proposing to operate a factory turning out a bulk
product requiring the daily use of many wagons for its deliv
ery comes fairly within the operation of the principle announce
in Rex v. Russell, 6 East, 427, where it was said, "That if th
nature of the defendant's business were such as to require th
loading of so many more of his wagons than could be conve
iently contained within his own private premises he must eithe

premises or remove his business to some more con-
." The appellee's premises front for at least one
l twenty-five feet on Wayne street, which is unused
ns, and also forty-five feet on Barre street. By a
e of this frontage, together with such enlargement
ises as the extensive delivery of its product may
n, at the cost perhaps of some inconvenience to it-
t its business without unreasonable interference
by the public of any of the streets.

ission of the board of estimates relied on by the
its proposed occupation and use of the sidewalk in
afford it no protection. The charter of Balti-
ctions 7 to 11, inclusive, contains specific provi-
anting any rights or franchises in or to its public
hich it requires the concurrent action of the mayor
council with the co-operation of the board of es-
is admitted that no such action was taken in this
ppellee sets up a mere permit from the board of
ued in exercise of powers supposed to have been
it by section 37 of the city charter. That section
he board of estimates to grant for such price and
erms as it may think proper the right to use the
ow or bay windows, hitching-posts, areaways, steps,
trees, storm-doors, drains and drain-pipes or other
ary or similar uses" after first serving copies of the
therefor upon the adjoining property owners.
does not, in our opinion, confer either in express
fair implication upon the board the power to grant
the uses here proposed to be made of the sidewalk
llee which are neither similar to those enumerated
', nor temporary in their nature. A temporary use
s one which from its character will not be of long
ch, for instance, as depositing thereon materials for
process of construction or repair, or the erection
d or other transient structure thereon. The ob-
d use of the sidewalk for private purposes here
be made by the appellee appear from the face of
be systematic and continuous in their nature.

the fact that the permit granted to the appellee
d of estimates was by its terms revocable at the
f the board alter the quality of the acts to be done
The nature of the acts to be done remains the same
e supposed authority to do them be defeasible in

its terms. The contents of sections 7 to 11 of the city ch ter, regulating the granting of franchises in property held the municipality for public purposes, excludes the view tl the legislature in enacting that instrument intended to con upon any subordinate municipal boards or official s power grant important franchises affecting public streets or proper

381 It would not be competent for the municipality itself confer authority upon any private person to employ the pu lic streets in any enterprise or occupation which would def the primary purposes for which they were dedicated to pub use.

As the appellee does not deny its intention to construct t platform and make the changes in the grade and pavement the sidewalk, and to deliver ice from the platform to wag standing on the sidewalk at the rate of one hundred tons p day, the appellants are entitled to their injunction without wa ing until the actual commission of those acts.

The decree appealed from will be reversed and the case manded to the end that an injunction may be issued restra ing the appellee from erecting the platform or removing t curb from the sidewalk or changing the grade of the latt If the appellee has already erected the platform or made t proposed changes, or any of them, in the curb and sidewa the circuit court is directed, upon a proper amendment of t bill, to require it by mandatory injunction to remove by so specified day the platform and restore the curb and sidewalk the grade and condition in which they were at the time of t filing of the bill.

Decree reversed with costs and cause remanded for furth proceedings in accordance with this opinion.

The Primary Object of Public Streets is to furnish a passageway travelers; and, while they may be put to other uses, they must enjoyed in subordination to this primary object: See the monograp note to Wright v. Austin, 101 Am. St. Rep. 101. The obstruction a public street by a private individual in his own interest cannot authorized by the municipality: People v. Harris, 203 Ill. 272, 96 A St. Rep. 304; First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. Rep. 46; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441.

NTRAL LIFE INSURANCE COMPANY v. D STATES FIDELITY AND GUARANTY NY.

[99 Md. 423, 58 Atl. 437.]

ITY INSURANCE.—The Failure of an Employé to Sign emnity renders it entirely inoperative, where such bond s face that it will be invalid unless signed by the em- at it is essential to the validity of the bond that his thereto subscribed, and that these are conditions the right of the employer to recover under the bond. from liability on the part of the insurer continues not- the receipt of premiums and the issuing of two renewal ey declare that they are subject to all the conditions the original bond. (pp. 315, 316.)

. Cross, for the appellant.

Bartlett and Isidor Rayner, for the appellee.

ERRY, C. J. This suit was brought by the Union Insurance Company, a body corporate, against the s Fidelity and Guaranty Company, also a body cor- appellant company, which was the plaintiff in the sued the appellee company upon a bond executed and by which the Fidelity company guaranteed f an employé of the life insurance company. The hich the suit was brought is in the usual form of a The following is among the provisions which it rovided further, that this bond is issued on the rstanding that the employé has not within the f the employer at any former period been a de- will be invalid unless signed by the employé." provided, "that it is essential to the validity of this e employé's signature be hereunto subscribed and There is a clause in the bond by which the employé d agrees with the bonding company that he will p harmless that company from and against all loss which the bonding company shall or may at any by reason of having entered into the indemnity e foot of the bond there is a place indicated for the the employé opposite a seal intended as the em- The bond sued on was delivered by the bond- to the life insurance company, but it never was e latter's employé whose fidelity it guaranteed.

The premium was paid for the first year. Before the exp
tion of the first year the bond was renewed upon the paym
of an additional premium, and a renewal receipt was gi
wherein it was stated that the fidelity [430] and guaranty c
pany continued in force the same bond for the period beginn
on the 15th of June, 1901, and ending on the 15th of Ju
1902, "subject to all the covenants and conditions of said
iginal bond heretofore issued on the fifteenth day of Ju
1900." Subsequently, that is to say, on the 10th of Ap
1902, the bond was again renewed and a second renewal cert
cate of the same tenor and effect as the first was again issu
continuing the bond in force until the 15th of June, 19
Thereafter, the appellant discovered that the employé wh
fidelity the bond guaranteed had become a defaulter and
embezzler, and thereupon it demanded indemnity from
fidelity and guaranty company. The latter disputed its lia
ity, and suit was brought to recover on the bond. The decla
tion set out the bond and the two renewal receipts, and aver
the defalcation. To this declaration, the appellee, the defe
ant below, demurred; the court sustained the demurrer
gave judgment for the defendant, and thereupon this app
was taken.

The sole question in the case is whether the failure of
appellant's employé, whose fidelity was guaranteed, to s
the bond of indemnity, prevented the bond from becom
operative and effective. Contracts of this character, like p
icies of fire insurance to which they are closely analog
though with which they are not strictly identical, must rece
a reasonable construction so as to give effect to the intent
of the parties thereto, and so as to carry out rather than def
the purposes for which they were executed. They sho
neither, on the one hand, be so narrowly or technically int
preted as to frustrate their obvious design; nor, on the ot
hand, so loosely or inartificially as to relieve the obligor fr
a liability fairly within the scope or spirit of their term
Credit Indemnity Co. v. Cassard, 83 Md. 276, 34 Atl. 703.
a recovery be permitted in this action it must be had in sp
of the definite provision that the bond should not be bind
unless signed by the employé whose fidelity it was intended
guarantee. The provisions which have been quoted above
declared in the bond itself to be "conditions precedent to
[431] right on the part of the employer to recover under t
bond." The liability of an indemnitor is measured by the c

ch he enters, and it is never enlarged by mere con-
include a term specifically excluded. Inasmuch
itor's liability is one dependent wholly upon con-
ld be anomalous to hold that he is answerable
ons directly contrary to the express stipulations
rtaking. When he covenants to be bound pro-
antecedent conditions are complied with by the
ified, in the very nature of things, if those con-
t fulfilled his liability never becomes fixed. This
ry that we do not pause to cite authority in sup-
Giving to the bond of indemnity the most liberal
contended for, treating it in point of fact as
o a technical policy of insurance, we cannot un-
the indemnitor can be held accountable upon it
f the explicit covenants that it should not be an-
ss designated provisions distinctly declared to be
ecedent to the validity of the bond have been
l with, when they have not been observed at all.
t an indemnitor may waive conditions inserted for
, but there is no averment in the declaration of
ver. The renewal receipts are explicitly declared
to all the covenants and conditions contained in
ond; and if the bond itself was inoperative by rea-
ilure of the indemnified to have its employé
renewal receipts could not give it validity. The
pts in terms reasserted the provisions of the bond,
urport to continue the bond in force without ref-
conditions upon the observance of which its
e first instance depended.

othing in the case of the American Bonding etc.
ukee Harvester Co., 91 Md. 733, 48 Atl. 72, in
these views. The bond sued on in the case just
ewhat similar to the one now before us, but there
etween that case and this one ends. In that case
igned the bond and the point before the court was
there was error in suing the surety company with-
he employé; and it was held that the failure to
loyé did not defeat the right of action against the
ny, because the bond sued on was not a joint ob-
employé having evidently united in it merely to
ent to its terms and to indemnify the bonding
he bond not being a joint obligation, it was un-
join the employé as a codefendant. But that rul-

ing is quite distinct from the proposition that underlies pending controversy. A case very closely analogous to the at bar is Blackmore v. Guaranty Co. of N. A., 71 Fed. 363 C. C. A. 77.

The life insurance company, the indemnified, cannot plain that there is any hardship inflicted upon it by hol the bond to be invalid by reason of the failure of its own ployé to sign it; because it had possession of the bond had control of its employé whose fidelity was guaran and the failure to secure that employé's signature was du its own omission or default alone. The indemnity com had the right to make its undertaking depend, as respect validity, upon the condition that the indemnified's emp should sign the bond. The condition was not unreasonabl illegal. The performance of it was within the power of indemnified. The neglect or omission of the latter to con with that condition precedent cannot be ignored when re on by the indemnitor; and cannot give efficacy to an ins ment which by its unequivocal terms was not to become o ative until that specific condition was complied with. W out prolonging this discussion, we think the court was cle right in sustaining the demurrer to the plaintiff's declara and its judgment will be affirmed.

Judgment affirmed with costs above and below.

The Principal Case is cited in the recent monographic not First Nat. Bank v. Fidelity and Guaranty Co., 100 Am. St. Rep. on fidelity insurance.

SERIO v. MURPHY.

[99 Md. 545, 58 Atl. 435.]

LANDLORD AND TENANT, Liability for Excavation.—If owner of adjacent premises in making an excavation thereon, a giving notice of his intention, causes the wall of a building to injured thereby, the tenant of the building cannot recover of landlord therefor, where there is nothing to show that such land was guilty of any negligence or failed in any duty imposed on by law. (p. 318.)

NEGLIGENCE cannot be Presumed because a wall crack falls. (p. 319.)

CARE, Degree of Required in Making an Excavation.—If owner of a building endangered by a proposed excavation rece

the party making the excavation is responsible only positive negligence in the manner of doing the work, ired to use the same degree of care that a prudent man in similar circumstances. (p. 319.)

ORD AND TENANT, Liability for Injuries Due to an tenant cannot recover for injuries suffered to the lding occupied by him from an excavation made on the ises, where the person making such excavation gave his intention to do so, and thereafter proceeded with (p. 320.)

AL SUPPORT, Duty of Guarding Against Damages of xcavation.—If a person is about to excavate his own y to the wall of an adjacent house, and gives reason- ereof to the adjoining owner, the latter is bound to n property, and the former is not liable for injury e excavation is made with ordinary care. (p. 320.)

AL SUPPORT, Excavation, Liability for, When does a person intending to excavate on his own lot gives to the proprietor of the adjoining premises, who, to perty, employs another to underpin it, and in carrying the wall is cracked, a tenant of the owner thereby in- right of recovery against the owner of the adjoining 320.)

Weeks, for the appellant.

Murphy, for the appellee.

ER, J. The plaintiff below, and appellant in brought an action to recover damages caused by a wall of the house he was occupying as a dwell-

briefly stated, are that the plaintiff was a tenant r P. Morgan of the premises known as No. 323 Baltimore City, under a written lease which con- enant that he was to make all repairs. This he rank J. Murphy is the owner of lots 320 and 322 side of West Lexington street. These lots run also front on Clay street, and adjoin the premises iff on the west. Mr. Murphy employed Henry erect a warehouse on his lot and sent a notice to the owner of the premises occupied by the plain- tention to excavate and requesting him to protect of his house. While this work was in progress plaintiff's witnesses the wall was cracked and , and the plaintiff was compelled to move out. ught this suit against Dr. Morgan, his landlord, pel, the builder, and Frank J. Murphy, the owner, ut to be improved.

At the close of the plaintiff's case the jury were instructed that he had offered no evidence legally sufficient to justify a verdict against either of the defendants, Morgan or Rippel. There was accordingly a verdict and judgment thereon in their favor and the case proceeded against the remaining defendant, Frank J. Murphy.

At the close of the testimony offered by defendant Murphy, the plaintiff offered one and the defendant five [555] prayers. The plaintiff's prayer was refused and those of the defendant were granted. These rulings, together with the granting of the prayers of the other defendants taking the case from the jury as to them constitute the only exception presented by this appeal.

It is impossible to read the record without coming to the conclusion at once that the trial court committed no error when at the close of the plaintiff's case the jury were told that no testimony had been offered by the plaintiff legally sufficient to entitle him to recover as against Morgan and Rippel.

The former, as we have seen, was the plaintiff's landlord, but as such he was not only under no obligation to repair, but that duty rested upon the plaintiff himself. The evidence shows, if it shows anything clearly and sufficiently, that while the excavation was being made upon the premises of the defendant Murphy, the wall was cracked and badly injured. There is an utter failure, so far as the plaintiff's testimony is concerned, to connect Dr. Morgan with this work. There is no proof offered by the plaintiff that he was guilty of any negligence or that he failed in any duty imposed on him by law. The notice to the effect that the wall in question as well as a floor joist had been condemned was sent to Dr. Morgan on the 29th April—long after the injury for which this suit was brought had happened—and, therefore, it affords no evidence whatever that Morgan was made acquainted with the bad condition of the wall before it cracked. But, as we have seen, under the lease it was the duty of the tenant to make repairs if any were necessary. Again, under the provisions of the city code offered in evidence by the plaintiff, even if there was any evidence that Dr. Morgan failed to comply with the notice to protect his wall, it was the duty of the building inspector of Baltimore City to do the work at Dr. Morgan's expense before the proposed excavation was made on the adjoining lot. In point of fact, however, it was developed in the further progress of the case that the wall was injured while

the underpinning was in progress and before the excavation was commenced for the building about to be erected on Murphy's lot.

556 Without prolonging this opinion by a rehearsal of the plaintiff's testimony, it is enough to say that there is no sufficient proof by the plaintiff that Rippel did the work of excavation or that it was done under his supervision or control. But if we assume there was legally sufficient proof of this fact, there is no evidence that he was guilty of such gross negligence as would make him liable under the settled rule applicable to cases like this.

In the first place, negligence cannot be presumed because the wall cracked or fell: 1 Thompson on Negligence, 277. And that seems to be the situation before us in this case. Nor is the highest degree of care required. If the owner of the building endangered by the proposed excavation has received proper notice, the party making the excavation is responsible only for actual or positive negligence in the manner of doing the work, and is not required to use the same care that a prudent man would exercise in similar circumstances: Jones on Easements, sec. 614. Or, in other words, as we have said in Shafer v. Wilson, 44 Md. 280, the work of excavating must be done with reasonable and ordinary care.

There was only one witness of the plaintiff who gave any testimony in regard to the manner in which the work was done, and even he did not see it done, but he appears to be of opinion that he being a very prudent man himself, he would not have ventured to underpin in this case without resorting to some other and further precautions. But he fails to give any facts to show actual and positive negligence, and when asked the direct question whether he considered it careless to underpin that building from the outside, he replied, that in thirty years' experience he had had much worse buildings to contend with and never had a mishap, because he always took precautions to guard against it. He did not examine the inside of the house. But assuming that there may have been some slight circumstances testified to by this witness which would have warranted the court in submitting to the jury the question whether Rippel was guilty of negligence, still the granting of this prayer worked no injury to the plaintiff—for this 557 very question, namely, whether Rippel exercised due and ordinary care was submitted to the jury in the instructions given at the instance of the defendant Murphy, and they found

there was no negligence; that the work was carefully and p
erly done—otherwise they could not have found, as they di
verdict for defendant.

This brings us to a consideration of the rulings of the c
on the prayers which were offered by the plaintiff and def
ant Murphy respectively at the close of the testimony on l
sides.

The plaintiff's prayer was properly refused, because i
based upon the proposition that the plaintiff is entitled to
cover without regard to the question of negligence, whe
the settled rule is that negligence must be shown before t
can be a recovery. The third and third and one-half and fou
prayers of the defendant only announce the well-settled
that if a person who is about to excavate his own lot in p
imity to the wall of an adjoining house gives reasonable no
thereof to the adjoining owner, the latter is bound to pro
his own property and the former is not liable for dam
sustained, if the excavation is made with ordinary care: Sh
v. Wilson, 44 Md. 282; Bonaparte v. Wiseman, 89 Md. 12
Atl. 918, 44 L. R. A. 482. The fifth of defendant annou
an equally plain proposition, viz., that if the defendant Mur
gave notice, as required, to Dr. Morgan to protect the prop
occupied by the plaintiff, and if said Morgan employed Ri
to do so, and the wall was cracked, no recovery can be
against Murphy. Obviously so, because according to the h
thesis of the prayer he was an absolute stranger to that
of the work. The uncontradicted testimony of Rippel is
the injury occurred after the time he undertook to do the
for Dr. Morgan and while he was doing the underpinning
him and not for Murphy. Defendants' sixth prayer is
under the authorities cited, free from error. It is to the e
that even if Rippel was acting for Murphy, still if due
ordinary care was exercised in the work, Murphy is not li

Finding no errors in the rulings excepted to, the judgm
appealed from will be affirmed.

Judgment affirmed with costs.

The Right to Lateral Support is discussed in the monographic
to Larson v. Metropolitan St. Ry. Co., 33 Am. St. Rep. 446
Charles v. Rankin, 66 Am. Dec. 647-651; Thurston v. Hancock, 7
Dec. 62-66. Where one contemplates making an excavation o
own land which will endanger the buildings of an adjoining o
he must give the latter notice of his intention. The object of
notice is to call the attention of the adjoining proprietor to the
proposed and thereby give him an opportunity to protect his prop

notice, however, does not relieve the excavator from negligence in conducting the work: See the monographic n v. Metropolitan etc. St. Ry. Co., 33 Am. St. Rep. 470, Summerfield, 131 N. C. 352, 92 Am. St. Rep. 781.

BANK OF BRISTOL v. BALTIMORE AND OHIO RAILROAD.

[99 Md. 661, 59 Atl. 134.]

ICT OF LAWS.—A bill of lading evidencing a contract ipper and a railroad company issued in Virginia has as are imposed upon it by the laws of that state. (p.

ICT OF LAWS—Presumption as to Laws of Another there is no evidence as to the laws of another state in of lading was issued, the court will presume that, as to g, the common law prevails in that state. (p. 326.)

ERS.—Bills of Lading are not by the Common Law the unrestricted sense, but are quasi negotiable only.

ERS.—The Common-law Negotiability of a Bill of Lad- Still Further Limited and Qualified by the insertion ppropriate terms wholly destroying all negotiability.

ERS.—A Non-negotiable Bill of Lading may be Assigned gnee takes a valid title to it, subject to the equities een the original parties, of which, if there are any, he ve notice. (p. 326.)

ERS—Bills of Lading—Assignee's Rights.—The as- on-negotiable bill of lading is not subject to the equities ons whose claims do not appear upon and are in no way th the bill. (p. 326.)

ERS.—The Transfer of a Bill of Lading is the Transfer Described in It, and whatever equities exist between it, with respect to the title to such property, follows it ds of the assignee, unless some other legal or equitable rvenes to preclude the assertion of prior rights against ssignee for value. (p. 327.)

ERS—Bill of Lading—Assignee's Right as Against operty.—If property is sold, and the vendee ships it by eiving a non-negotiable bill of lading, the assignee of value, in good faith, is not chargeable with notice of such vendor, whether or not he reserved title until he purchase price should be made. (p. 328.)

ERS—Bill of Lading, Assignee of, When not Affected His Assignor.—Though the vendee of property acquires ereof by fraud of the vendor, yet if the former ships and receives a bill of lading therefor, the assignee of good faith and for value acquires title to the property

represented thereby free of the title and equities of such ve
(p. 331.)

LOSS, by Whom must be Borne.—Where a loss has happ
which must fall upon one of two innocent persons, it must be b
by him who has occasioned the loss, even without positive f
committed by him, but more especially if there has been any
lessness which has caused or contributed to the misfortune. (p. 3

STOPPAGE IN TRANSITU, Right of, When Lost.—If a ve
of property takes possession of and ships it by railroad, receivi
non-negotiable bill of lading, which he subsequently assigns
purchaser or pledgee in good faith and for value, the vendor
thereafter no right of stoppage in transitu. (p. 331.)

JURY TRIAL, Prayer for Instruction, When Properly Refu
A prayer instructing the jury that the plaintiffs are entitled to
cover, provided they find certain facts, should not be given, if t
is evidence of other facts from which the jury should be justifie
drawing a conclusion different from that which the prayer requ
them to find. (pp. 331, 332.)

Francis E. Pegram and Edwin T. Dickerson, for the ap
lant.

George P. Bagby and Charles T. Bagby, for the appellee.

671 McSHERRY, C. J. This is an appeal from a judgn
rendered by the superior court of Baltimore City. An ac
of trover was instituted in that court by the appellant, the
tional Bank of Bristol, against the Baltimore and Ohio R
road Company to recover the value of a carload of walnut l
ber of which the appellant claimed to be the owner, and wh
it was alleged the appellee had converted to its own use.
declaration, which sets out at large the facts upon which
appellant relies to make out its case, need not be particul
alluded to inasmuch as no questions arise on the pleadings.
only matters with which we are concerned on this appeal
those presented by the two bills of exception contained in
record. The first bill of exception brings up a ruling of
court on the admissibility of evidence, and the second conc
the action of the trial court on the prayers for instruction
the jury.

There is some conflict in the evidence, but that is not
material consequence in dealing with the legal princi
which will control this controversy, because the facts must
timately be found by the jury.

It appears that on the seventh day of November, 1902, a
tain E. L. De Camp, drew at Bristol, Tennessee, a draft
Cameron & Company, 29 P. O. avenue, Baltimore, Maryl
payable to the order of John B. Baumgardner, cashier,

dollars, which was cashed by the Bristol National
e proceeds [672] were carried on the books of that
credit of the drawer. Attached to the draft was
ling issued by the Norfolk and Western Railway
Marion station, Virginia, on November 7, 1902,
portation of one carload of walnut lumber in car
hipped by E. L. De Camp, "Shipper as Owner"
d "To the order of E. L. De Camp, Locust Point."
ce of the bill of lading there was printed in full
he words "not negotiable." Immediately beneath
appears the following clause: 'If the word 'order'
mediately below or after the name of the party to
the property is consigned, the surrender of the bill
perly indorsed shall be required before the delivery
rty at destination, as provided by section 9 of the
the back hereof." When the draft was discounted
in the regular course of business the bill of lading
by De Camp and attached thereto as collateral se-
he draft with the attached bill of lading was for-
payment, but was returned to the appellant bank
days protested for nonpayment. At the time the
scounted for De Camp he represented himself to
fide owner of the bill of lading and the lumber,
olely on the faith and security of the bill of lading
ount was made. Within five days after De Camp
dited with the proceeds of the draft by the Bristol
ecked out the funds. After Cameron & Company
to accept the bill of lading and pay the draft, and
ad been returned to the bank on November 13th,
warded the bill of lading to Price & Heald in Bal-
instructions to receive the carload of walnut lum-
l in the bill of lading and to sell the same for ac-
appellant bank. Price & Heald on November 14th,
the Baltimore and Ohio Railroad Company the
g for the carload of walnut lumber, and demanded
nber be turned over to them, but the appellee
comply with that demand and delivered the lum-
gents of Atkins Brothers, who had given the
a bond of indemnity, to secure the railroad com-
loss by reason of the delivery of the lumber to At-
s.

llee then proved, after the court had overruled an
the admissibility of the evidence, that the firm of

Atkins Brothers, manufacturers of lumber at Attoway, Virg agreed to sell to E. L. De Camp a carload of walnut lun they to load the same and to hold it until a check give them by De Camp on the appellant bank was paid. The l ber, the same now in controversy, was to continue to rei the property of the vendors until the check was paid; that t was not a sale but an agreement to sell, which De C fully understood; that De Camp, without the authority, kn edge or consent of the vendors, shipped the car and cured the bill of lading to be made out in his own na that he did not assure the vendors that the check he them was good; that when the check last alluded to was turned unpaid the vendors went to Baltimore, whither lumber had been shipped, and reaching there before the arrived, gave a bond of indemnity to the railroad comp and secured the lumber which they sold through an ag that De Camp gave the vendors a check in payment for lumber on November 7th, but dated it the day following, that the vendors deposited it in their bank on November 1 for collection; that Atkins Brothers made no effort to a tain whether the check would be paid and that they mad arrangement with the railroad authorities that the car sh remain on the siding, where it had been loaded, until could hear from the check. When the check was prese at the Bristol National Bank, De Camp had no funds to credit there, having withdrawn them about the 12th of vember. On November 18th, after the return of De Ca check to Atkins Brothers, the latter wrote to the appel bank a letter in which they said: "Messrs. Price & Heal Baltimore, Maryland, state that you have sent them bil lading for car of lumber, N. & W. No. 23914 to sell for account. We would respectfully notify you that this ca 674 lumber belongs to us. We sold it to Mr. E. L. De Ca in payment of which he gave his check and draft on your b which you refused to honor claiming that De Camp had funds."

To the admissibility of all of this evidence the plaintiff jected, but the court overruled the objection and there the first exception was reserved. We need not pause at time to inquire whether the evidence objected to, and a set forth, was admissible, because in considering the actio the court upon the prayers contained in the second bill of ception the propriety of the ruling made in the first excep will be necessarily involved.

l the appellant produced a letter from Atkins
ted November 17th, and addressed to Price &
gents of the appellant bank, in which the follow-
t is made: "On November 7th, we shipped from
ginia, to Locust Point Station, Baltimore, car of
& W. No. 23914. We sold this car to E. L. De
ed to him in Baltimore. He gave us in settlement
part and draft for balance. The bank at Bristol
nds, consequently we wish to stop the payment of
to E. L. De Camp."

close of the evidence each party presented one
of the appellant was rejected; whilst that of the
granted. These prayers will be found set forth in

heory upon which the court evidently acted in re-
ppellant's and in granting the appellee's prayer
title of the bank to the lumber, and its right to
s action, depended wholly upon its ownership of
ding, and as that instrument had stamped upon it
not negotiable" the bank did not stand in the sit-
bona fide indorsee of a negotiable security who
alue before maturity without notice of any imper-
ts origin, and as Atkins Brothers had prior equi-
could not recover.

Prayer.—If the jury find from the evidence that Messrs.
rs sold and shipped to E. L. De Camp at Baltimore,
arload of walnut lumber, as set out in the bill of lading
dence, and received from said E. L. De Camp his check
settlement, then, notwithstanding said draft and check
d, a good title passed from Atkins Brothers to said
ich title passed to the plaintiff upon the indorsement
lading, and their verdict must be for the plaintiff.

Prayer.—The defendant prays the court to instruct the
n though they find that Atkins Brothers sold the lum-
versy to De Camp, and delivered same to the Norfolk
Railroad for transportation and delivery to De Camp,
yet, if they find that De Camp obtained the title to
of said lumber by giving Atkins Brothers in pay-
draft which turned out to be worthless, and that when
rs learned that said draft was worthless, and before
had delivered said lumber, Atkins Brothers de-
the defendant turn over said lumber to them and
ly the defendant did turn over said lumber to Atkins
verdict must be for the defendant, provided the jury
hat the bill of lading filed with the declaration was
he state of Virginia, and that at the time De Camp
ill of lading to the plaintiff (if the jury find that it
d), it had the words "not negotiable" printed on its
d.)

The bill of lading evidencing the contract between the s per and the railway company was issued in Virginia and qualities are such as the law of that state, and not the la this state, impressed upon it. There is no proof in the re as to what the law of Virginia is in this respect, and we n consequently presume that as to bills of lading the com law prevails there. By the common law a bill of lading not in an unrestricted sense a negotiable instrument lik promissory note, but was as this court has repeatedly st quasi negotiable only: Baltimore etc. R. R. Co. v. Wilkins Md. 11, 22 Am. Rep. 26. But even that restricted com law negotiability may be limited and still further qualifie the insertion of appropriate terms wholly destroying all n tiability, and it seems to be generally agreed that suc result may be accomplished by simply stamping or prin across the face of the instrument the words "not negotia as was done in this instance: 21 Am. & Eng. Ency. of I 2d ed., 545. The non-negotiability of the bill of lading not prevent it from being assignable. Like any other negotiable instrument, or chose in action, it may be transfe 676 by assignment, and when thus dealt with the assignee t a valid title to it subject, of course, to the equities existing tween the original parties to it, of which, if there are any is held to have had notice: Steel v. Sellman, 79 Md. 1, 28 811. But what are the equities with which the assignee non-negotiable bill of lading in such a case as this is chargea Surely not the equities of third parties whose names do appear upon and are in no way connected with the bill of ing. A bill of lading as a mere document is valueless. cf consequence only in so far as it is the evidence of titl something in somebody. Its transfer is the transfer of title to the thing described in it, and whatever equities between the parties to it with respect to the title of the p erty which it purports to represent, will follow that prop into the hands of the assignee of the bill of lading, unless s other legal or equitable principle intervenes to preclude th sertion of a prior right as against a bona fide assignee for v

In the case at bar the name of Atkins Brothers does appear upon the bill of lading at all. De Camp was the os sible owner and the actual shipper of the lumber and he also the consignee. Nothing was disclosed on the face of instrument to indicate that any other person than De C had any right to or claim upon the lumber, and there

o word, mark or sign to put the bank on inquiry
mp's ownership or to suggest even a suspicion that
se had a superior right to the property. When
llateral fact, which is known to an assignee of a
ion and which if followed would result in reveal-
ence of the ultimate fact sought to be established,
dge of such collateral fact will be held equivalent
f the ultimate fact and will bind the party to be
onclusively as though actual knowledge of the ulti-
d been brought home to him. But the bill of lad-
no entry which could possibly have induced the
ecture that De Camp was not the exclusive owner
er. Any inquiry it could have [677] made would
ither from De Camp or from the railroad agent
he bill of lading, and there is nothing in the record
that the latter could have stated verbally anything
n that which the bill of lading discloses; whilst De
t represented himself to be the owner of the lum-
quiry, therefore, on the part of the bank from either
es to the bill of lading would have disclosed any-
that which the bill of lading itself exhibited.
were conceded that in spite of there being nothing
of the bill of lading to indicate that Atkins Broth-
the lumber to De Camp and that the latter had
it, and that because of these circumstances, the
it did not know them, was none the less charge-
nowledge of them, merely because the words "not
were indorsed upon the bill of lading; still there
before the jury tending to show, if credited by
state of facts as would preclude Atkins Brothers
ng a title to the lumber as against the appellant
e was evidence as we have stated, particularly that
the letters from which extracts have been quoted,
how that Atkins Brothers had sold this lumber to
had loaded it on a car for him; had shipped it to
nd had received and accepted from him a check for
price, dated one day after the actual sale. This
believed by the jury, would enable them to conclude
ad been a sale of the lumber on credit and a de-
to the common carrier, which was a delivery to the
therefore, that the title had passed from Atkins
De Camp: Hall v. Richardson, 16 Md. 396, 77 Am.
If the jury believed, from the evidence, that there

had been a sale and delivery of the lumber, to De Camp, t
the latter was authorized to procure the bill of lading in his
name as shipper and owner, and a subsequent failure to
the vendors the price he agreed to pay did not devest the
thus acquired. Bearing in mind that we are dealing wit
bill of lading that is only assignable and not negotiable accord
to [678] the terms contained upon its face, when De Camp c
into possession of that muniment of title and assigned it
the bank, the latter acquired by the assignment precisely
title which De Camp on that day himself had.

A bill of lading represents the goods described in it
Cyc. 426. Bills of lading by the law-merchant are repres
atives of the property for which they have been given,
the indorsement and delivery of a bill of lading trans
the property from the vendor to the vendee; is a comp
legal delivery of the goods, devests the vendor's lien.
though the vendor's lien is thus devested by reason of
complete delivery of the indicia of property, he may, if
goods have not yet reached the actual possession of the bu
and if no third person has acquired rights by obtaining a tr
fer of the bill of lading from the buyer, intercept the goods
the event of the buyer's insolvency before payment, by
exercise of the right of stoppage in transitu. These princi
in relation to the effect of a bill of lading were first con
sively established in the great leading case of Lickbarrow
Mason, 2 Term Rep. 63; 1 Smith's Leading Cases, 753; 2 B
jamin on Sales, sec. 1211.

In Midland Nat. Bank v. Missouri etc. R. R. Co., 62
App. 531, the following facts appeared. Prior to October
1891, the Currier Commission Company was engaged in
grain and commission business in Kansas City, Missouri.
did its banking business with the Midland National Bank
that place, and had done so for several years. The commiss
company not having sufficient funds of its own to carry on b
ness to its satisfaction arranged with the bank for accommo
tions, which were represented by notes and overdrafts, and
was a part of the agreement for credit, by which the amount
the indebtedness of the commission company to the bank sho
be secured, that the company would pledge all original shipp
bills of lading and elevator receipts. During the months
July, August and September, 1891, one Follansbee, a purch
ing agent of the Currier Commission Company, shipped
different times from Burlington, [679] Kansas, over the M

as and Texas Railroad three cars of corn and two
. The former were consigned to Kansas City
rder" with instructions to notify Currier Commis-
ny, Kansas City; and the latter were consigned to
hipper's order, notify Currier Commission Com-
so the bills of lading were made out. In payment
rew his drafts on the Currier Commission Company
l to each draft the proper bill of lading. When the
bills of lading made their appearance in Kansas
rrier Commission Company paid them by its checks
land Bank and then placed those bills of lading
k to be held as collateral. When the five carloads
seed reached Kansas City the Railroad Company
e same to the Currier Commission Company, or,
he same thing, at Currier's request, rebilled them
ints, without the production or surrender of the
ng. On October 28th, the Currier Company failed
and at the time owed the plaintiff bank in excess
terals. Thereupon the bank demanded the grain
led for by the bills of lading, but the railroad com-
f course, unable to produce them because they had
rebilled to other parties. Suit was then brought
against the railroad company. The bills of lading
l on their face the words "not negotiable." The
"When Follansbee, the shipper, indorsed and de-
ills of lading to the Currier Commission Company,
e owner thereof, with full power of disposition; and,
owner, it had the absolute right, by the transfer
s of lading, to convey its title to the plaintiff bank.
as done; the delivery of the bills of lading to the
l a pledge of the property, to the same extent and
ne validity as if it had been actually delivered.
lading were symbols of the grain—represented it—
ransfer by delivery stood as an actual change in
n of the grain itself. The plaintiff bank held the
collateral security for the advances made to the
Company; and so far as it was necessary to the
-protection, plaintiff had the legal title and was
ll the rights and remedies of a purchaser for value:
lls of Lading, sec. 510 et seq.; Hutchinson on Car-
29; Dymock v. Railroad, 54 Mo. App. 400. The
negotiable" stamped on the face of the bills of lad-
vise destroyed their assignability. The sole effect

of these words was to exempt such bills of lading from the
visions of our statute in relation thereto: Rev. Stats. 1889,
745; Dymock v. Railroad, 54 Mo. App. 400. They are to
treated, then, as at common law." It is said by the supr
court of Indiana in the case of Moore v. Moore, 112 Ind.
2 Am. St. Rep. 170, 13 N. E. 673, to be familiar law "tha
the owner, although induced thereto by fraud, invests ano
with the apparent legal title to the chattels in pursuance
contract, the person so clothed may transfer an unimpeach
title to a good faith purchaser." The same court in the
above cited stated further: "We are unable to discover any g
reason for a distinction in that regard between chattels
such instruments as may be assigned by indorsement so a
give the assignee a complete legal title. The more mod
rule upon the subject under consideration seems to be,
where the owner of things in action, although not technic
negotiable, has clothed another to whom they are delivered
the method common to all mercantile communities with
usual apparent indicia of title, he will be estopped from sett
up against a second assignee to whom the securities have b
transferred for value and without notice, that the title of
first assignee was not perfect and absolute": 2 Pomeroy's Equ
Jurisprudence, sec. 710; Burton's Bill, 93 Pa. St. 214."

We have said that the bank acquired by the assignment
the bill of lading precisely the title that De Camp had to
lumber on the day the transfer was made. But it is insis
that De Camp obtained possession of the lumber by fraud
therefore that he got no title to it at all and consequently co
give none to the bank. If it be conceded that he did
cure the lumber by fraud, still if the bank was ignorant
*381 the fraud and took the bill of lading in good faith and
value it acquired an unassailable title, even as against the
frauded vendor. That proposition has been distinctly set
in Hall v. Hinks, 21 Md. 417. It is there said: "All
authorities agree that although as between the original par
a sale and delivery of goods obtained by fraud is void (vo
ble), and may be rescinded at the election of the vendor,
the property reclaimed from the fraudulent vendee; yet
they have passed into the hands of a bona fide purcha
without notice, he takes a good title, which cannot be
peached by the defrauded vendor. It is not necessary to
authorities in support of this proposition; we have said th
is no conflict upon this question and the principle has b

y the court of appeals expressly in Powell v. Brad-
& J. 221, and incidentally in Ratcliffe v. Sangston,
"

ciple which lies at the root of this doctrine is a
r one. It is a general and just rule that when a
opened which must fall upon one of two innocent
must be borne by him who has occasioned the loss,
t any positive fault committed by him, but more
f there has been any carelessness on his part which
or contributed to the misfortune: Somes v. Brewer,
, 13 Am. Dec. 406. An illustration of the applica-
doctrine is found in Eversole v. Maull, 50 Md. 95,
Chickering, 64 Md. 349, 54 Am. Rep. 770, 1 Atl.
e jury should believe that the bank acted in good
counting the draft for De Camp and accepting the
g as collateral security, and if Atkins Brothers, by
n the power of De Camp to deal with the property
enabled him to mislead the bank, and if in conse-
heir confidence in him and the credit of one day
gave him a loss must fall either upon the bank or
then, wholly aside from all questions respecting the
of the bill of lading, the doctrine imposing the
e persons by whose carelessness De Camp was en-
resent to the bank that the property was his, that
casioned by that [682] representation must fall up-
There was no right of stoppage in transitu if the
quired title to the lumber.

er presented by the appellant was wrong because
to the bill of lading the characteristics of a nego-
ment, whereas by its terms it was declared to be
le. The prayer granted at the instance of the ap-
wrong because it denied a recovery on any ground,
the bill of lading was declared to be non-negotia-
rayer in effect withdrew from the consideration
ll the facts relative to the acquisition of title to the
e bank, because it made no reference to those facts
Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088, this
"A prayer instructing the jury that the plaintiff is
recover provided they find certain facts, withdraws
ry the consideration of all facts other than those
and if from such excluded facts the jury would be
drawing a conclusion different from that which the
res them to find, it is error to grant such a pray-
vidence excepted to in the first bill of exception was

admissible for the reasons that we have heretofore given dealing with the prayers. Under the instruction granted, jury returned a verdict for the defendant, the appellee, an judgment was entered in its favor thereon, and from that ju ment this appeal was taken. For the error committed granting the appellee's prayer the judgment must be reve and a new trial will be awarded.

Judgment reversed with costs above and below and a trial awarded.

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I. Scope of Note.

we shall refer to the general nature and characteris- f lading only with reference to those features of such may seem essential to a proper understanding of the tly conflicting decisions of the courts with respect to l liabilities of assignees of such instruments. For an tement of the law relating to the general features of g, see the monographic note to Chandler v. Sprague, 407. And for a discussion of the subject with respect arising through clauses in bills of lading in regard

to subrogation to insurance in case of loss of the goods shippe the note to Mobile Ins. Co. v. Columbia etc. R. Co., 44 Am. St. 734; and with respect to the limitation of carrier's liability on of lading, see the extended note to Chicago etc. Ry. v. Calume Farm, 88 Am. St. Rep. 74. In our discussion of the peculiar r arising out of assignments of bills of lading when accomp by bills of exchange for the price of the goods described in bills which we shall include in this note on account of the c very often declaring that it is immaterial whether the bank or indorsee holds them merely as collateral or as a bona fide chaser, we shall advert to the liability of an assignee of a bi lading with draft attached to the consignee for failure of title defect in the goods, which question was exhaustively treated in recent note attached to Hall v. Keller, 91 Am. St. Rep. 212, bec of the recent decision of the Texas supreme court (S. Blaisdell, Co. v. Citizens' Nat. Bank, 96 Tex. 626, 97 Am. St. Rep. 94 S. W. 292), wherein that court disapproved the doctrine annou in Landa v. Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48, which one of the authorities upon which one line of conflicting aut ties upon that branch of the subject was based.

II. General Nature of Bill of Lading.

a. General Characteristics of Bills of Lading.—The conflicting cisions as to the rights arising from assignments of bills of la undoubtedly arise from the mixed characteristics of such bill that they are a receipt for the goods, an evidence of title to goods, a contract to carry the goods, and also an instrument quasi negotiable character. Anciently, it seems that bills of la were considered a marine document, but of course it has long settled that they are documents applying to both water and carriers: Baltimore etc. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. That bills of lading constitute both a receipt for the goods an contract to carry them from the place of shipment to the p of destination is not disputed: O'Brien v. Gilchrist, 34 Me. 554 Am. Dec. 676; Freeman v. Kraemer, 63 Minn. 242, 65 N. W. Cunard etc. Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310. In Pol v. Vinton, 105 U. S. 7, 26 L. ed. 998, the court said: "A bill of ing is an instrument well known in commercial transactions, and character and effect have been defined by judicial decisions. the hands of the holder, it is evidence of ownership, special or eral, of the property mentioned in it, and of the right to rec said property at the place of delivery. Notwithstanding it is signed to pass from hand to hand, with or without indorsem and it is efficacious for its ordinary purposes in the hands of holder, it is not a negotiable instrument or obligation in the s that a bill of exchange or a promissory note is. Its transfer not preclude, as in those cases, all inquiry into the transaction

inated, because it has come into hands of persons who
tly paid value for it. The doctrine of bona fide pur-
applies to it in a limited sense.
ntract of twofold character. It is at once a receipt and
In the former character it is an acknowledgment of the
operty on board his vessel by the owner of the vessel.
it is a contract to carry safely and deliver. The re-
goods lies at the foundation of the contract to carry
If no goods are actually received, there can be no
t to carry or to deliver." See, also, Missouri Pac. Ry.
, 154 U. S. 155, 14 Sup. Ct. Rep. 990, 38 L. ed. 944, to
ct.
ding is a contract between the shipper and the carrier
e shipper so far as the conditions named therein are
the eye of the law, because by receiving the bill of
ipper is presumed to have assented to its terms, al-
y not have signed it: Davis v. Central etc. R. Co., 66
m. St. Rep. 852, 29 Atl. 313. In so far as the bill of
wledges the receipt of goods and states their condi-
be contradicted as between the original parties to the
not quite clear whether the carrier can contradict its
third persons have acquired rights by purchase or ad-
upon the statements contained in it: Wayland v. Mosely,
9 Am. Dec. 335; O'Brien v. Gilchrist, 34 Me. 554, 56
; Portland Bank v. Stubbs, 6 Mass. 422, 4 Am. Dec.
. Grand Trunk R. Co., 15 Mich. 206, 93 Am. Dec. 184;
c. Co. v. Furthmann, 149 Ill. 66, 41 Am. St. Rep. 265.
We shall later on discuss the subject with respect to
where the rights of assignees of the bill are concerned.
that a bill of lading, except as to the acknowledgment
of the goods and their quantity and condition, is a
ct which cannot be varied by parol evidence: McElveen
y. Co., 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.
iversally acknowledged feature of bills of lading is
resent the goods described in them, or, in other words,
f the property covered by them: See the principal case
nk of Bristol v. Baltimore etc. R. R., ante, p. 321);
hic note to Chandler v. Sprague, 38 Am. Dec. 419. Or,
stated, a bill of lading stands for and represents the
receipted for during the transit and until they are
livered to the person entitled to them: American Nat.
erson, 123 Ala. 612, 82 Am. St. Rep. 147, 26 South. 498.
stated that a bill of lading represents the property
has been given, and by its indorsement or by delivery
sement the property in the goods may be transferred
the intent with which the indorsement or delivery is
v. Meyer, 61 Cal. 405. And that a bill of lading is

the representative of the property mentioned therein and tha consignor loses control of the property by a transfer and deli of the bill of lading: Robert C. White etc. Co. v. Chicago et R. Co., 87 Mo. App. 330.

But a bill of lading does not represent goods or merchandise, shipped on board a vessel, unless the bill of lading was deliv to the true owner of the goods or merchandise: Blossom v. Cham 37 Barb. 554. In the case just cited the court said: "It is n the power of a common carrier or bailee to change the title to chandise shipped on board of a vessel, or intrusted for storage the delivery of a bill of lading or storage receipt for such chandise, to some person not the bona fide owner thereof, or sessed of the apparent right of ownership, or of disposal as a Even the subsequent purchaser of such a bill of lading or sto receipt, transferred in good faith for a valuable consideration, confer no title to the merchandise therein mentioned upon the chaser. It may create a liability against the vessel and owner in the case of a storage receipt, against the bailee, to the ex of the damage sustained by the purchaser, but the title to the chandise is not affected. There may be cases, also, wherein true owner would be estopped from alleging his title against holder of a bill of lading, by reason of some act or misconduc his part." So, also, in Barnard v. Campbell, 55 N. Y. 456, 14 Rep. 289, the court observed: "While possession of a bill of la or other document of like nature may be evidence of title, an some circumstances and for some purposes equivalent to actual session of the goods, it does not constitute title, nor of itself a the operation of the general rule that property in chattels ca be transferred except by one having the title or authority from true owner."

For a more extended treatment of this subject, see subdivis VIII, IX and X.

b. Extent of Negotiability of Bills of Lading.

1. In General.—A bill of lading is not negotiable in the fu sense of that term like a bill of exchange, or, in other words, though its negotiability is not attended with all the conseque resulting from the negotiability of a bill of exchange, yet it is gotiable in so far that by indorsement the right to the possessio the goods mentioned in it passes: National Bank v. Atlanta etc. 25 S. C. 216; Blanchard v. Page, 8 Gray, 297. A bill of lad even when running to the order or assigns of the consignee, is a negotiable instrument like a bill of exchange, but a symbo representation of the goods mentioned in it: Stollemverck v. Thac 115 Mass. 224; Raleigh etc. R. Co. v. Lowe, 101 Ga. 320, 28 S 867. And it has been held that bills of lading are not by the c mercial law negotiable in the same sense as bills of exchang

s, but that they are merely the evidence of owner-
r special, of the property mentioned in them, and
receive such property at the place of delivery; and
g advances of money upon them does so at his own
notice of the limitation as to the power or rights of
gent to sign the bills of lading: Lazard v. Merchants'
. 1, 26 Atl. 897.

Batavia v. New York etc. R. Co., 106 N. Y. 201, 60
12 N. E. 433, the court said: "While bills of lading
ble in the sense applicable to commercial paper, they
transferred as security for loans and discounts and
m the ownership, either general or special, of the
they describe. It is the natural and necessary ex-
carrier issuing them that they will pass freely from
and advances be made upon their faith, and the
right to believe, and never does believe, that their
t is limited to the person to whom they are first
ued."

Mississippi Cent. R. Co., 29 La. Ann. 446, it was said
ding is negotiable to the extent that it is transferable
or indorsement, and that the transferee takes all the
he carrier that are conferred on the consignee or the
assigns or whose order the goods are to be deliv-
Missouri Pac. Ry. v. McFadden, 154 U. S. 155, 14 Sup.
38 L. ed. 944, it was held that a bill of lading does
the character of a negotiable paper so as to transfer
thereof the rights of the holder of such paper.

Douglas v. People's Bank, 86 Ky. 176, 9 Am. St.
W. 420, in showing the reasons why bills of lading
ble in the fullest sense of the word, said: "A bill of
possess the characteristics of bills of exchange or
instruments placed upon the footing of bills of ex-
culiar characteristics of these instruments rest either
commercial usage, sanctioned by express decision.
g has neither of these foundations to rest upon. It
ent money but property. No one ever supposed that
ation to pay so much in property, or to deliver such
rty, possessed the characteristics of negotiability in
bill of exchange, or other instrument placed upon
bill of exchange.

nents represent money in commercial usage, and the
for value in the usual course of trade is protected
ties of the antecedent parties. Nor is such innocent
ffected by any infirmity in such instruments. They
some cases against the claim of the rightful owner;
dorsee or assignee of a bill of lading, which is made

to the order of the shipper, must trace his title back to it owner. He has no greater right than the true owner.

"When it is said that such a bill of lading is negotiable, it i meant that its true owner may transfer it by indorsement signment so as to vest the legal title in the indorsee." quently, some of the courts have stated that bills of ladi only quasi negotiable: National Bank of Bristol v. Baltimo R. R., ante, p. 321; National Bank of Commerce v. Merchants Bank, 91 U. S. 92, 23 L. ed. 208; Louisiana Nat. Bank v. La 52 Mo. 380.

2. Effect of Word "Non-negotiable" on Bill of Lading.— principal case (National Bank of Bristol v. Baltimore etc. ante, p. 321), it was held that the common-law extent of negoti of a bill of lading may be still further limited and qualif writing or stamping upon the face of the instrument the word negotiable." But it was also stated that the non-negotiabil a bill of lading does not prevent it from being assignable. likewise held in Midland Nat. Bank v. Missouri etc. Co., 62 Mo 531, that the words "not negotiable" on the face of the lading do not destroy its assignability, but that it merely m statute touching the question of negotiability inapplicable. it has also been said that if a common carrier desires to its responsibility to the named consignee, alone, it must sta bills "non-negotiable": Colgate v. Pennsylvania Co., 102 N. 6 N. E. 114; Bank of Batavia v. New York etc. R. Co., 106 201, 60 Am. Rep. 440, 12 N. E. 433. See, also, First Nat. B New York etc. R. Co., 85 Hun, 160, 32 N. Y. Supp. 604. The principle has been applied to promissory notes: See Prins v. Branch Lumber Co., 20 Ill. App. 241.

3. Effect of Statutes Affecting Negotiability.—In some states statutes have been enacted with a view to making bills ing absolutely negotiable or of extending their negotiabilit Tiedeman v. Knox, 53 Md. 612, where a statute of that ch was construed. The effect of such a statute was also co in National Bank of Commerce v. Chicago etc. R. Co., 44 224, 20 Am. St. Rep. 566, 46 N. W. 342, 560, 9 L. R. A. 263 court in that case held that the statute did not put bills of upon the footing of bills of exchange, but merely made the t and delivery of these symbols of property in the mode there scribed equivalent for certain purposes to an actual transf delivery of the property itself. So, also, in Shaw v. Railro 101 U. S. 557, 25 L. ed. 892, the effect of several statutory pro on the negotiability of a bill of lading was raised. The bill ing was issued in Missouri and the cotton described in the b delivered in Pennsylvania. The statute of Pennsylvania d that bills of lading "shall be negotiable and may be transfer indorsement and delivery," while that of Missouri declare

be negotiable by written indorsement thereon and de-
he same manner as bills of exchange and promissory
e court said: "There is no material difference between
ons. Both statutes prescribe the manner of negotiation;
dorsement and delivery. Neither undertakes to define
such a transfer. We must therefore look outside of the
earn what they mean by declaring such instrument ne-
The court then proceeded to discuss the meaning of ne-
nd its application to bills of exchange. In the course
ssion the court observed: "It does not necessarily fol-
e, that because a statute has made bills of lading ne-
indorsement and delivery, all these consequences of an
and delivery of bills and notes before maturity ensue
led to result from such negotiation."
then remarked upon the fact that bills of exchange rep-
while bills of lading represent other forms of prop-
d: "They are in commerce a very different thing from
ange and promissory notes, answering a different pur-
rforming different functions. It cannot be, therefore,
tute which made them negotiable by indorsement and
negotiable in the same manner as bills of exchange and
otes are negotiable, intended to change totally their
t them in all respects on the footing of instruments
e representatives of money, and charge the negotiation
the consequences which usually attend or follow the
f bills and notes. Some of these consequences would
ge, if not impossible—such as the liability of indorsers,
demand at diem, notice of nondelivery by the carrier,
oss of the owner's property by the fraudulent assign-
nief. If these were intended, surely the statute would
mething more than merely make them negotiable by
No statute is to be construed as altering the common
than its words import. It is not to be construed as
nnovation upon the common law which it does not fairly
ecially is so great an innovation as would be placing
g on the same footing in all respects with bills of lad-
inferred from words that can be fully satisfied without

c. **Assignability of Bills of Lading.**

eral.—A bill of lading is assignable: Gates v. Chicago
Neb. 379, 60 N. W. 583. In the principal case (National
istol v. Baltimore etc. R. R., ante, p. 321), it was
bill of lading may be assigned, and the assignee takes
to it, subject to the equities existing between the
ies, of which, if there are any, he is held to have
altus v. Everett, 20 Wend. 267, 32 Am. Dec. 541, Chan-
rth said: "The bill of lading is, by the custom of mer-
erable, so as to vest in the assignee the title to the

goods which the assignor had in them; but if a person, withou thority from me, ships my goods and takes a bill of lading i own name, he cannot, by assigning that bill of lading to ano devest my title to the property."

And it was held in Chandler v. Belden, 18 Johns. 157, 9 Am. 193, that the legal property in goods passes by a bill of lading a bona fide assignment thereof for a fair consideration, even th the assignment be made after the arrival of the vessel in port.

2. Effect Where Issued in Duplicate or Triplicate.—Bills of la are sometimes issued in three parts, marked "first," "second" "third": Robinson v. Memphis etc. R. Co., 9 Fed. 129.

"Where the bill of lading is drawn in triplicate, the indorse transferee of the first of the set obtains the title as against a sequent indorsee of the others, and the master is justified in d ering the goods to the first indorsee: Glyn v. East & West I Docks, L. R. 5 Q. B. D. 129; Meyerstein v. Barber, L. R. 2 C 38, L. R. 4 Eng. & Ir. App. 317; The Tigress, Brown & L. 38. if the holders of one of the other copies obtain possession of goods and convert them to their own use, they are liable to prior indorsee in trover: Glyn v. East & West India Docks, L. Q. B. D. 129"; monographic note to Chandler v. Sprague, 38 Dec. 421. But where the carrier issues duplicate bills of la without marking them duplicates, the carrier is liable: Wichita Bank v. Atchison etc. R. Co., 20 Kan. 519. And where a bill of ing was executed in duplicate, one of the papers being signed the agent of the carrier and accepted by the shipper, and the o being signed by the shipper and retained by the agent, the two p are to be treated as one and the same writing: Richmond etc. v. Shomo, 90 Ga. 496, 16 S. E. 220. But where two bills of lad one marked "original" and the other "duplicate," are issued the railroad company for the same goods, they are of equal v and the transfer by indorsement of the one marked "duplicate" the consignee, who holds the legal title, to a bona fide assignee value as collateral security, transfers the title to the goods and feats the seller's right of stoppage in transitu: Missouri Pacific v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W.

The first transferee of a bill of lading, though it be only on a set of three bills, acquires the property, and the subsequent tr fers of the bills are subject to the first transfer: First Nat. B v. Ege, 109 N. Y. 120, 4 Am. St. Rep. 431, 16 N. E. 317. An Midland Nat. Bank v. Missouri Pac. Ry., 132 Mo. 492, 53 Am. Rep. 505, 33 S. W. 521, it was held that the carrier cannot es liability to the indorsee of the original bill of lading where it tu over the goods to the consignee on the simple surrender of its plicate bills, or rebilled the goods to other points without the duction, surrender or cancellation of the original bill of lading, me on the ground that the assignee did not present its bills in a sonable time.

III. Methods of Assigning Bills of Lading.

eral.—"Property in things movable can only pass from y his own act and consent except in those cases, only, owner has by his own direct, voluntary consent or act on the person from whom the bona fide vendee derives parent right of property as owner or of disposal as ssom v. Champion, 37 Barb. 554. A bill of lading rep- roperty for which it has been given, and by its indorse- delivery without indorsement the property in the goods sferred when such is the intent with which the indorse- very is made: Dodge v. Meyer, 61 Cal. 405. The indorse- livery of a bill of lading is constructive delivery of the he indorsee: Union Pac. Ry. v. Johnson, 45 Neb. 57, 50 540, 63 N. W. 144. But even though the indorsement of a bill of lading for value transfers the title to the ed in it, still it is not an assignment of the contract e force of some statute: Cox v. Central Vermont Ry., 9, 49 N. E. 97. But neither the indorsement nor delivery lading has any effect in passing the title or dominion the property described in it except as a result of a veen the parties, and the real transaction may be shown lker v. First Nat. Bank, 43 Or. 102, 72 Pac. 635.

of Mere Delivery.—A delivery of the evidence of title y symbol can have no greater efficiency than a manual the property itself, which does not deprive the vendor to rescind the sale; hence, it is said that if the con- a contract for the sale of the cargo and assigns the g, he may rescind the sale if the assignee refuses to contract: The Schooner Treasurer, 1 Sprague, 473, Fed. 59. Hence, it is said that the delivery of the evidences orders indorsed upon them is equivalent to the deliv- roperty itself if the receipt so delivered was intended of the property: First Nat. Bank v. Dearborn, 115 Mass. Rep. 92. But some of the authorities declare that in- e bill of lading represents the goods for which it was livery passes title as effectually as an actual delivery even though the bills are not indorsed: American Zinc Co. v. Markle Lead Works, 102 Mo. App. 158, 76 S. the same effect, see monographic note to Chandler v. Am. Dec. 420; Marine Bank v. Wright, 46 Barb. 45; ank v. New York etc. R. Co., 85 Hun, 160, 32 N. Y. mery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. chants' Bank v. Union etc. Transp. Co., 69 N. Y. 373, holding that goods shipped under a bill of lading drawn he shipper could be transferred by delivery of the bill rsement, based its decision upon the theory that such

bills are choses in action in that respect. And in Allen v. Willi 12 Pick. 297, Chief Justice Shaw said: "Even a sale or pledg the property without a formal bill of lading by the shipper w operate as a good assignment of the property, and the deliver an informal or unindorsed bill of lading or other documentary dence of the shipper's property would be a good symbolical d ery so as to vest the property in the plaintiffs."

So, also, in Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 34 S. W. 858, the court observed: "When goods are consigned the right of disposition is retained in the consignors by the bi lading, then the delivery of the bill without indorsement for v transfers the property in the goods included in the bill. Suc the legal effect of a bill of lading for goods consigned to a fa for sale on account of the consignors, as in such cases there i sale of property before the transfer of the bill"; citing nume authorities.

The delivery without indorsement of a bill of lading of good transit to consignee who had made advances was held sufficient livery of the goods to constitute a pledge, and the person a ward advancing money to the shipper obtains no rights superio those of the consignee, although at the time of making the adva the goods were with a warehouseman who did not know of consign rights: Campbell v. Alford, 57 Tex. 159.

But in Louisville etc. Co. v. Barkhouse, 100 Ala. 543, 13 So 534, it was held that the possession of a bill of lading by one o than the consignee without indorsement does not justify the de ery of the consignment to such person and that a custom to the trary will not exempt the carrier from liability for so delivering goods.

Where the shipper is the owner of the goods, the bill of lad may be transferred by delivery without an indorsement: Michi Cent. R. R. v. Phillips, 60 Ill. 190. In Robinson v. Stuart, 68 Me. it was said that bills of lading are transferable by indorsement.

c. **Effect of Indorsement in Blank.**—In the leading case of L barrow v. Mason, 2 Term Rep. 63, it was held that there is no tinction between a bill of lading indorsed in blank and an indo ment to a particular person. Consequently, it is held that the ow of a bill of lading indorsed in blank and intrusted to anothe estopped from claiming title to the goods as against a bona fide ho for value with whom it has been pledged: See Conard v. Atla Ins. Co., 1 Pet. 386, 7 L. ed. 189; Pollard v. Reardon, 65 Fed. 13 C. C. A. 171. So, also, voluntarily placing bills of lading indo in blank in the hands of persons so that the latter can obtain vances thereon from innocent parties prevents the indorser f maintaining any claim against the goods to the prejudice of parties: Munroe v. Philadelphia Warehouse Co., 75 Fed. 545. But this connection, see Bank v. Cummings, 89 Tenn. 609, 24 Am. Rep. 618, 18 S. W. 115.

of Statutes Regulating Mode of Transfer.—A statute
t the indorsement and delivery of bills of lading shall
the property represented by such bills of lading does
the mode of transfer, and such transfer may therefore
ed by the delivery of such bills of lading for a valuable
without indorsement: Scharff v. Meyer, 133 Mo. 428, 54
672, 34 S. W. 858.

IV. Who may Assign Bills of Lading.

n General.—A bill of lading is strong proof of the in-
e parties with respect to the property described in it,
lusive. If the bill shows that the consignment was
benefit of the consignor or his order, it is very strong
intention to reserve the jus disponendi. And on the
the bill of lading shows that the shipment is made for
the consignee, it is almost decisive of the consignor's
part with the ownership of the property. If the bill
not disclose the person for whose benefit the consign-
le, it is of less weight on the question of the shipper's
ery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep.
of lading can be transferred so as to vest title or
transferee only by the person to whom it is issued or
ity. If transferred by an unauthorized stranger, the
sferee cannot claim any damages from the carrier for
may have suffered thereby: Jasper Trust Co. v. Kansas
., 99 Ala. 416, 42 Am. St. Rep. 75, 14 South. 546. Or, in
the indorsement of a bill of lading in order to convey
nust be made by the person to whom or to whose or-
are consigned: D'Wolf v. Harris, 4 Mason, 515, Fed.
1. Of course, a consignor who has reserved the jus
ay effectuate a sale or pledge of the property con-
ivery of the bill of lading to the purchaser or pledgee
as if the property were in fact delivered: Dodge v.
. 405. Thus, in Halsey v. Warden, 25 Kan. 128, it was
the bill of lading has not been delivered to the con-
ere has been no actual delivery to him of the property,
transfer of the goods by the general owner by trans-
ill of lading to another is unquestioned." But a spe-
thorized to deliver a bill of lading only upon the pay-
ll of exchange drawn against the goods and attached
lading, cannot bind his principal by a delivery with-
nent, and one thus acquiring a bill of lading indorsed
igh acting in good faith in regular course of business
alue, acquires no title as against the principal: Bank
89 Tenn. 609, 24 Am. St. Rep. 618, 18 S. W. 115.

f Fraudulent Holder to Assign the Bill.—In the prin-
ational Bank of Bristol v. Baltimore etc. R. R., ante, p.

321), the court, after laying down the principle that where a has happened which must fall upon one of two innocent perso must be borne by him who has occasioned the loss even wi positive fault committed by him, but more especially if there been any carelessness which has caused or contributed to the fortune, held that though the vendee of property acquires session thereof by fraud of the vendor, yet if the former ship property and receives a bill of lading therefor, the assignee of bill in good faith and for value acquires title to the property r sented thereby free of the title and equities of such vendor. B Decan v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334, it was held the fraudulent holder of a bill of lading can pass no title to the by indorsing it to a purchaser for value without notice of the f since, having no title to the goods himself, none can pass by h dorsement. And it has been held that the transferee of a ficti bill of lading or one fraudulently transferred has no remedy ag an indorser unless for the special wrong, and cannot import int indorsement a promise to perform what the carrier has agree purported to have agreed to do: Maybee v. Tregent, 47 Mich. 4 N. W. 287.

For a more extended discussion of this subject, see subdivi VIII, IX, and X.

V. Duty of Assignee to Ascertain Title of His Assignor.

A bona fide purchaser of a false bill of lading is put on in as to the existence of the parties to whom it was issued, an failure to so inquire and to obtain this indorsement is a bar t claim for damages against the carrier issuing it: Jasper Trust Kansas City R. Co., 99 Ala. 416, 42 Am. St. Rep. 75, 14 South And it seems that an assignee of a bill of lading from one wh pears on the face of it to be an agent cannot claim to be a bon holder without notice, since the capacity of the person as age enough to put him on inquiry as to the true state of the title: v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334.

VI. Rights of Assignee as Dependent upon Time of Transf

a. In General.—An assignment of a bill of lading while the are in possession of the carrier operates to transfer the title th Ayres etc. Co. v. Dorsey Produce Co., 101 Iowa, 141, 63 Am. St. 376, 70 N. W. 111. But a carrier is not liable on its bill of l to a transferee thereof where the transfer was made by the cons after the goods had been delivered to the consignee: Adams v Steamer Trent, 19 La. Ann. 262. But in this connection see, also division XI, and with reference to assignments of bills of ladi sued without the actual receipt of the goods described in the subdivision VIII, b.

b. Effect Where Made After Destruction of the Goods Wh Transitu.—In Kirkpatrick v. Kansas City etc. Co., 86 Mo. 341, i

h the goods were destroyed while in transitu, the prop-
owner in them still continued to such an extent that a
the bill of lading could sue the carrier for damages
truction.

Where Made After the Delivery of the Goods.—It was
ional Commercial Bank v. Lackawanna Transp. Co., 59
0, 69 N. Y. Supp. 396, that where the bill of lading
the bill of lading should be surrendered and canceled
ivery of the goods, the carrier is not liable to a trans-
bill of lading, who took it without the knowledge that
d been delivered, as for the conversion of the goods,
ctions of the bill had ceased upon the delivery of the
ems that the statutes of New York provide that the bill
st be surrendered upon the delivery of the goods. The
er, held that any liability, if any, arising by virtue of
was not available in a suit based upon the theory of
But, in this connection, see, also, Colgate v. Pennsyl-
Hun, 297. And also, see subdivision XI.

General Rights and Liabilities of Assignee.

eral.—In the principal case (National Bank of Bristol v.
. R. R., ante, p. 321), it was held that the transfer of a
is the transfer of the thing described in it, and what-
exist between the parties to it with respect to the
uch property follow it into the hands of the assignee,
other legal or equitable principle intervenes to preclude
of prior rights against a bona fide assignee for value,
assignee of a non-negotiable bill of lading is not subject
s of third persons whose claims do not appear upon, and
ay connected with, the bill.

ading when indorsed to a bona fide purchaser for value
notice of adverse claims, passes the legal title of the
the indorsee: Winslow v. Norton, 29 Me. 419, 50 Am.
can v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334. Bills
present the property, and when indorsed or assigned,
symbolical delivery to the indorsee or assignee of the
ered by such bills: First Nat. Bank v. Mt. Pleasant
103 Iowa, 518, 72 N. W. 689. And it was said in the
d that: "The possession of a bill of lading, whether in-
, is prima facie evidence of title, as against any person
a better title"; citing Michigan Cent. R. R. Co. v.
Ill. 190; Pratt v. Parkman, 24 Pick. 42; City Bank v.
Co., 44 N. Y. 136. By indorsement of a bill of lading
obtains the right to the delivery of the goods named
onal Bank of Chester v. Atlanta etc. Ry., 25 S. C. 216.
of the older cases have held that by such an indorsement
becomes, as against all the world, the owner of the goods

described in the bill of lading: The Schooner Mary Ann Guest, Ol 498, Fed. Cas. No. 9197.

But however that may be, it is said that bills of lading are syn of property, and, when properly indorsed, operate as a deliver the property itself, investing the indorsees with a construc custody which serves all the purposes of an actual possession, an continues until there is a valid and complete delivery of the p erty under and in pursuance of the bill of lading and to the pe entitled to receive the same: Pennsylvania R. Co. v. Stern, 119 St. 24, 4 Am. St. Rep. 626, 12 Atl. 756. See, also, Union Pac. R Johnson, 45 Neb. 57, 50 Am. St. Rep. 540, 63 N. W. 144; Forbe Boston etc. R. Co., 133 Mass. 154; The Thames, 14 Wall. 98, 20 L 804, to the same effect. Sometimes it is merely said that the ass ment of a bill of lading, bona fide and for value, will vest the l title and interest of the consignor in his assignee: Chandler v. Bel 18 Johns. 157, 9 Am. Dec. 193. In Missouri Pac. Ry. v. Heidenhei 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608, it was said th bill of lading is a quasi negotiable instrument symbolizing the p erty described therein, and that the delivery of the bill with assignment indorsed thereon transfers to an assignee, in good f and for value a perfect title to the goods, thus defeating the ri of stoppage in transitu, although the goods are actually in transi the time of the assignment.

But it is also said that the holder of a bill of lading can acquir greater rights under it than were possessed by the original signee: Hunt v. Mississippi etc. R. Co., 29 La. Ann. 446; Alab Nat. Bank v. Mobile etc. Ry., 42 Mo. App. 284.

b. Distinction Between Rights and Liabilities of Assignee A distinction seems to be drawn between the rights and the liabil of the assignee, to the effect that his rights are to be measured those of his assignor, while his liability is not necessarily the sa Tolerton v. Anglo-California Bank, 112 Iowa, 706, 84 N. W. Many of these distinctions will be shown in the discussion of cases under subdivision XV.

c. Right of Carrier to Rescind Bill of Lading After Assignmen After a bill of lading, which is made negotiable by statute has b assigned by the shipper for value to another, the contract for shipment cannot be rescinded without the consent of the assig and the issuance of a second bill of lading to the shipper witl the surrender of the first or the consent of the assignee cannot af his rights under the first contract: The Protection, 102 Fed. 516 C. C. A. 489.

d. Liability of Assignee for the Freight Charges.—The assig of a bill of lading has no right to require the delivery of the c without paying the freight: The Schooner Treasurer, 1 Sprague, Fed. Cas. No. 14,159.

ghts Arising from the Recitals in Bills of Lading.

Nature and Effect of Such Recitals.—As will be seen sions which we shall discuss under this subdivision, are by no means uniform as to the effect to be given in bills of lading.

been held that a bill of lading, being of a negotiable not to the extent or in the sense of a bill of ex- nissory note, one who voluntarily puts it out or permits ut, is estopped to claim the goods as against one who ances value on it, if one of the two must suffer: Pollard Fed. 848, 13 C. C. A. 171. So, also, that one to whom lading is indorsed and transferred by the person to issued, and who parts with value and becomes the in- of it without notice, may hold the carrier issuing it r the truth of its recitals and for damages to the may have advanced on the faith of its genuineness: Co. v. Kansas City etc. R. Co., 99 Ala. 416, 42 Am. St. outh. 546.

Carrier to Deny Actual Receipt of Goods as Against withstanding Recital to the Contrary.—It seems that whether the carrier is liable to an assignee of the bill here it has issued the bill of lading on goods not ved by it, has always been argued with great stren- the fact that the courts, when passing on that ques- ays fortified their opinions by the various reasons for forth in the previous authorities on the subject. Al- e sustained by the great preponderance of authority is is not liable to the assignee of a bill of lading for a that it has received the goods described for trans- the reasons advanced to sustain the rule are not al- tory.

uthorities on both sides of this question are shown in livered by Justice Mitchell in National Bank of Com- ago etc. R. Co., 44 Minn. 224, 20 Am. St. Rep. 566, 46 30, 9 L. R. A. 263. The learned justice, though evi- ongly impressed with many of the reasons set forth the rule, was strongly impressed with the fact that the supported by the weight of authority, and that being question there should be a uniformity of rule. In de- pinion, he said: "A carrier in issuing a bill of lading elivered to him for transportation does not warrant the hipper. But what is the rule where no property was at all for transportation, and the agent of the carrier ently, or through mistake or negligence, issues a false which passes into the hands of a bona fide consignee r value? There is an unbroken line of authorities in even as against a bona fide consignee or indorsee

for value, the carrier is not estopped by the statements of
bill of lading issued by his agent from showing that no goods
in fact received for transportation: Grant v. Norway, L. R
Com. B. 665; Coleman v. Riches, L. R. 16 Com. B. 104; Hubberth
Ward, L. R. 8 Ex. 330; Brown v. Powell Coal Co., L. R. 10 C. P.
McLean v. Fleming, L. R. 2 H. L. 128; Cox v. Bruce, L. R. 18 Q. 1
147; Meyer v. Dresser, L. R. 16 Com. B., N. S., 646; Jessel v. B
L. R. 2 Ex. 267. And this has not been at all changed by the bil
lading act, 18 & 19 Victoria, chapter 111, section 3. It is also
settled doctrine of the federal courts: Schooner Freeman v. B
ingham, 18 How. 182, 15 L. ed. 341; The Lady Franklin, 8 Wall.
19 L. ed. 455; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; St. I
etc. Ry. v. Knight, 122 U. S. 79, 7 Sup. Ct. Rep. 1132, 30 L. ed. 1
Friedlander v. Texas etc. Ry., 130 U. S. 416, 9 Sup. Ct. Rep. 53
L. ed. 991. What was said in Schooner Freeman v. Buckingham
How. 182, 15 L. ed. 341, was probably obiter, for in that case it
sought to hold the interest of the general owner in a ship liable
bill of lading issued by the special owner, who was not the a
of the former. But what is there said is important both as being
utterance of so eminent a jurist as Curtis, J., and also becaus
often quoted with approval by the same court in subsequent c
The case of The Lady Franklin, 8 Wall. 325, 19 L. ed. 455, did
involve the question of a bona fide purchaser, but is importan
announcing that the principle is the same, whether the false
of lading is issued fraudulently or by mistake. But in view of
later cases cited above, there is no room to doubt that that
is firmly committed to the doctrine in its broadest scope. The
rule obtains in Massachusetts, Maryland, Louisiana, Missouri, N
Carolina, and, apparently, Ohio: Sears v. Wingate, 3 Allen,
Baltimore etc. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Fe
v. Steamer Powell, 16 La. Ann. 316, 79 Am. Dec. 581; Hur
Mississippi Central R. Co., 29 La. Ann. 446; Louisiana Nat. Ba
Laveille, 52 Mo. 380; Williams v. Wilmington etc. R. Co., 93 N
42, 53 Am. Rep. 450; Dean v. King, 22 Ohio St. 118. The
writers all agree that the overwhelming weight of authority i
this side: See note to Chandler v. Sprague, 38 Am. Dec. 410.
reasoning by which this doctrine is usually supported is that
of lading is not negotiable in the sense in which a bill of exch
or promissory note is negotiable, where the purchaser need
look beyond the instrument itself; that so far as it is a receip
the goods it is susceptible of explanation or contradiction, the
as any other receipt; that the whole question is one of the la
agency; that it is not within the scope of the authority of the
ping agent of a carrier to issue bills of lading where no pro
is in fact received for transportation; that the extent of his au
ity, either real or apparent, is to issue bills of lading for fr
actually received; that his real and apparent authority, i. e.
power with which his principal has clothed him in the charact

ld out to the world, is the same, viz., to give bills of
ds received for transportation; and that this limita-
authority is known to the commercial world, and there-
n purchasing a bill of lading issued by the agent of a
t his own risk as respects the existence of the fact
f the goods) upon which alone the agent has authority
ill, the rule being that if the authority of an agent is
pen for exercise only in a certain event, or upon the
a certain contingency, or the performance of a certain
occurrence of the event or the happening of the con-
he performance of the condition must be ascertained
would avail himself of the results ensuing from the
e authority. An examination of the authorities also
ey apply the same principle whether the bill of lading
udulently and collusively, or merely by mistake.
states that we have found in which a contrary rule
pted are New York, Kansas, Nebraska, apparently
erhaps Pennsylvania: Armour v. Michigan Cent. Ry.
111, 22 Am. Rep. 603; Bank of Batavia v. New York
3 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; Sioux City
First Nat. Bank, 10 Neb. 556, 35 Am. Rep. 488, 7 N. W.
etc. R. Co. v. Larned, 103 Ill. 293; Brooke v. New
Co., 108 Pa. St. 529, 56 Am. Rep. 235, 1 Atl. 206. The
hese cases is, in substance, that the question does not
upon the negotiability of bills of lading, but upon
f estoppel in pais; that where a principal has clothed
power to do an act in case of the existence of some
necessarily and peculiarly within the knowledge of
l of the existence of which the act of executing the
a representation, the principal is estopped from deny-
nce of the fact, to the prejudice of a third person who
the agent or acted on his representation in good faith
ry course of business. This rule this court in effect
pplied in McCord v. Western Union Tel. Co., 39 Minn.
. Rep. 636, 39 N. W. 315, 1 L. R. A. 143. It is urged that
to this reasoning in view of the fact that bills of lad-
d and dealt with by the commercial world as quasi
d, consequently, it is desirable that they should be
onfidence and not distrust; and that for these considera-
etter to cast the risk of the goods not having been
the carrier who has placed it in the power of agents
posing to make these representations, rather than upon
consignee or indorsee, who, as a rule, has no means
the fact.
stion was res integra, we confess that it seems to us
ment would be very cogent. But, on the other hand,
l that carriers are not in the business of issuing and

dealing in bills of lading in the same sense in which bankers and deal in bills of exchange; that their business is transpo property; and that if the statements in the receipt part of bi lading issued by any of their numerous station or local a are to be held conclusive upon them, although false, it would op wide a door for fraud and collusion that the disastrous consequ to the carrier would far outweigh the inconvenience resulting t commercial world from the opposite rule. It is also to be adm that it requires some temerity to attack either the policy or s ness of a rule which seems to have stood the test of experience has been approved by so many eminent courts, and under the most successful commercial nation in the world has deve and conducted her vast commerce ever since the inception of riers' bills of lading. But on questions of commercial law, eminently desirable that there be uniformity. It is even mor portant that the rule be uniform and certain than that it be the one that might be adopted. Moreover, on questions of general mercial law the federal courts refuse to follow the decisions o state courts, and determine the law according to their own vie what it is. It is, therefore, very desirable that on such que the state courts should conform to the doctrine of the federal c The inconvenience and confusion that would follow from having conflicting rules on the same question in the same state, one i federal courts and another in the state courts, is of itself alm sufficient reason why we should adopt the doctrine of the fe courts on this question. To do otherwise, so long as the jurisdi of those courts so largely depends on the citizenship of suitors, really result in discrimination against our own citizens. In defer therefore, to the overwhelming weight of authority, but without mitting ourselves to all the reasoning of the decided cases o subject of agency, we deem it best to hold that a bill of lading i by a station or shipping agent of a railroad company or common carrier, without receiving the goods named in it for t portation, imposes no liability upon the carrier, even to an inn consignee or indorsee for value, and that the rule is the same wh the act of the agent was fraudulent and collusive, or merely th sult of mistake."

So, also, in Robinson v. Memphis etc. R. Co., 9 Fed. 129, the in an exhaustive opinion, basing its decision on the ground that agent receipting for goods not actually received, acts beyond authority, followed the weight of authority. The court cited, as taining the rule announced by it, the following cases: Scho Freeman v. Buckingham, 18 How. 182, 15 L. ed. 341; Vandewat Mills, 19 How. 90, 15 L. ed. 557; The Lady Franklin, 8 Wall. 19 L. ed. 455; The Keokuk, 9 Wall. 517, 19 L. ed. 744; Buckle Naumkeag Co., 24 How. 386, 16 L. ed. 599; The Loon, 7 Blatchf. Fed. Cas. No. 8499; The Joseph Grant, 1 Biss. 193, Fed. Cas.

Mayflower, 3 Ware, 300, Fed. Cas. No. 9346; The Edwin, 477, Fed. Cas. No. 4300; The Leonidas, 1 Olcott, 12, Fed. 32; Backus v. Schooner Marengo, 6 McLean, 487, Fed. Cas. 'he J. W. Brown, 1 Biss. 76, Fed. Cas. No. 7590; The Sprague, 71, Fed. Cas. No. 14,274; Blagg v. Phoenix Ins. h. C. C. 5, Fed. Cas. No. 1477; Dixon v. Columbus etc. 4 Biss. 137, Fed. Cas. No. 3929; Bradstreet v. Heran, 2 3, Fed. Cas. No. 1792a; Relyea v. New Haven Rolling Mill 1. 579, 75 Fed. 420.

e goods mentioned in an alleged bill of lading are not at the time of the issuance of the bill of lading, the t be deemed to be a bill of lading, and a transfer of such nt does not confer upon the assignee ownership of the oned therein: Union etc. Transp. Co. v. Yeager, 34 Ind. 1. o distinction between a bill of lading given by a carrier one given by a carrier on water in this respect: Robin- phis etc. R. Co., 9 Fed. 129; King v. Shepperd, 3 Story, as. No. 7804. Hence the rule has often been applied to the water: See Baltimore etc. Co. v. Wilkens, 44 Md. 11, . 26; Sears v. Wingate, 3 Allen, 103; Fellows v. Steamer ll, 16 La. Ann. 316, 79 Am. Dec. 581; The Delaware, 14 0 L. ed. 779; Schooner Freeman v. Buckingham, 18 How. d. 341; Lazard v. Merchants' etc. Co., 78 Md. 1, 26 Atl.

rities sustaining the minority rule to the effect that the esponsible for the recital of the receipt of the goods ct he did not receive them for transportation, seem to ited in the Minnesota case, from which we quoted so ex- The reasons advanced in support of the minority rule avorably set forth in the opinion by Justice Mitchell in But in addition to the authorities therein cited, see also, . Bank v. Atchison etc. R. Co., 20 Kan. 519, and Tibbits nd etc. Co., 49 Ill. App. 567. The leading case in New g the minority view (Bank of Batavia v. New York 106 N. Y. 201, 60 Am. Rep. 440, 12 N. E. 433), seems to ased on the theory that the freight agent acts within the pe of his agency in signing bills of lading, and that no l exist between the carrier and assignee to make the ilable, other than that flowing from the wrongful act ent injury. The federal court in Walters v. Western etc. 369, drew this distinction, that where bills of lading, ods have been delivered, are by collusion between the nt and the consignee redelivered to the consignee, who to an innocent holder as collateral, the carrier is respon- holder for the goods, since it was by reason of the car- ence that they were reissued.

The elementary rule is that the liability of a common carrier pends upon the delivery to him of the goods which he is to ca Missouri Pac. Ry. v. McFadden, 154 U. S. 155, 14 Sup. Ct. Rep. 38 L. ed. 944. Hence it was said in Lazard v. Merchants' etc. 78 Md. 1, 26 Atl. 897, that there could be no failure on the par the carrier to deliver the goods to the shipper or his assigns wl the goods were never delivered to the carrier, since the receipt the goods lays at the foundation of the contract to carry and deli In Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998, one of the ea authorities sustaining the majority rule, it was said that the the upon which the rule was based was that the carrier's agent has authority to sign receipts for goods which have not been recei and that if he does so, his principal is bound thereby, and that who takes such a document takes it with notice of this limita upon the agent's authority, and cannot require the principal to m good a loss occasioned by the want of prudence in trusting to agent's unauthorized act.

It seems to us that some of the reasons advanced in support the majority rule are unsound, though the rule is undoubtedly s ported by sufficient reason to be free from doubt on the ground unsoundness, notwithstanding the cogency of the reasons advanced support of the minority rule.

It was said in an early case in Louisiana that the holder of a of lading can acquire no greater rights under it than were posses by the original consignee: Hunt v. Mississippi Cent. R. Co., 29 Ann. 446. It seems to us that the authorities sustaining the minor rule ignore the fact that the carrier is not an insurer of the title the property which it is transporting; however, it may be responsi for the safety of the property. And although the scope of the c rier's business naturally allows its agents to issue receipts for goods to be transported by it, together with a contract for the tra portation of such goods, still the issuance of negotiable instrume or of instruments to be used for the purposes of barter and excha would seem to be out of its natural scope of business. Hence, would seem that when bills of lading are so used, they are emplo in a use foreign to the purpose of their issuance. It seems to us t as far as the bill of lading is a symbol of the property, that t feature of the document is a matter which concerns only the part interested in the bill of lading other than the carrier; and that in character as a receipt which does concern the carrier, that the bill lading being as to that phase of its character subject to impeachm between the original parties, ought not to gain a conclusive charac by being used for a purpose not intended by the party (the carri which issued it.

c. **Impeachment or Construction of Amount or Quality of Go Described in Bill of Lading.**—It seems that in the hands of a bo fide assignee for value and without notice, the recital in the bill

he quantity, quality, and condition of the goods shipped
neral rule, conclusive upon the carrier: Dickerson v.
rb. 99; Bradstreet v. Heran, 2 Blatchf. 116, Fed. Cas.
But it seems that the rule would be different if fraud
e shown: Backus v. Schooner Marengo, 6 McLean, 487,
. 712.

W. Brown, 1 Biss. 76, Fed. Cas. No. 7590, the court held
een the original parties—the shipper and owner of the
ip owner could show that the bill of lading was given for
uantity of wheat. And with reference to the applica-
octrine of equitable estoppel, observed: "This rule ap-
he bill of lading has been assigned to a third person by
It is upon this principle the case of Howard v. Tucker,
L. 661, was decided. The captain had signed a bill of
wledging the freight had been paid, which was contrary
d the court held the owners of the vessel were estopped
wledgment as against an assignee, to whom it had been
value. I think it will be found that this doctrine of
is has only been applied to the bill of lading when it
sferred to a third party."

ften the printed part of the bill of lading contains the
ents unknown," or similar words, indicating a lack of
garding the true nature of the consignment, although
ords describe the quantity, quality, or apparent condi-
oods. In such cases the case generally resolves itself
of construing the descriptive terms in the bill of lad-

erini Stamphalia, 19 Fed. 123, the libelant, who was a
orsee of the bill of lading, sued for a short delivery of
e evidence showed that all the iron ore was delivered
en received on board the vessel. The court said: "No
ade, but that this would be a good defense as against
The libelant, the Credit Lyonnais, however, contends
fide indorsee of the bill of lading for value, it has a
upon the representation as to the amount of iron
ined in the bill of lading, and a right to hold the vessel
rs for the delivery of this amount. The bill of lading,
essly states that the 'quantity, weight and contents are
n the body it recites the receipt of four hundred and six
s, and this is equal to only four hundred tons; only
hundred and sixty-two tons were delivered. In the
bill of lading, however, is an entry 'freight to be paid
lred and ten tons,' etc. Numerous authorities establish
a clause in the bill of lading reciting that the weight
unknown, qualifies the effect of other statements as to
or weight, and authorizes proof to show that a less
in fact, received on board: Clark v. Barnwell, 12 How.

272, 630, 13 L. ed. 985; Vaughan v. Six Hundred and Thirty Ca
Sherry, 7 Ben. 506, Fed. Cas. No. 16,900; Six Hundred and T
Casks of Sherry, 14 Blatchf. 517, Fed. Cas. No. 12,918; Shephe
Naylor, 71 Mass. (5 Gray) 591; Kelley v. Bowker, 11 Gray, 42
Am. Dec. 725; The Nora, 14 Fed. 429.

"In the cases on this subject I find no distinction made in
of an indorsee of a bill of lading. Most of the cases above cite
those of such an indorsee. Nor do I perceive any reason why any
distinction in his favor should be made; for upon the face o
bill of lading itself he has notice of the qualification which au
izes the master to show that a less amount was actually rece
He cannot be, therefore, in the legal sense, a bona fide holder,
ing upon a representation by the master of a specific amount rec
on board. There is no room, therefore, for any estoppel as
in favor of a bona fide indorsee where no such qualification ap
on the face of the bill of lading: Bradstreet v. Heran, 2 Blatchf
Fed. Cas. No. 1792a; Meyer v. Peck, 28 N. Y. 598; One Hundred
Twelve Sticks of Timber, 8 Ben. 214, Fed. Cas. No. 10,524" In
connection, see, also, Jessel v. Bath, L. R. 2 Ex. 267, and Hadd
Parry, 3 Taunt. 303.

The case of Miller v. Hannibal etc. R. Co., 90 N. Y. 43
Am. Rep. 179, is perhaps a case based upon as strong facts
this line as will be found in practice. In that case the ca
received from a person representing himself to be a membe
a certain firm, thirty barrels for transportation over its lin
railway. It delivered to him a bill of lading stating that it
received from said firm, consigned to their order, "the follo
described packages in apparent good order (contents and valu
known) consigned as marked and numbered in the margin."
part just quoted was printed, but following it the carrier's agent
written "articles, 30 bbls. eggs." The person receiving the
indorsed it in blank in the name of the firm to whom it was is
and annexed it to a draft drawn on plaintiff. The draft, with
bill of lading annexed, was paid by the plaintiff. The barrels
filled with sawdust, and contained no eggs. The fraud or bad
was charged against the carrier. The court in discussing the rul
construction applicable adverted to the rule that in case of a r
nancy between the written and printed clauses of an instrument
written clause will prevail over the printed, but also observed
that rule is only resorted to from necessity when the clauses ca
be reconciled. "But," the court remarked, "it is the imper
duty of courts to give effect if possible to all the terms of an a
ment. The construction is to be made upon a consideration o
whole instrument, and not upon one or more clauses detached fro
others; and this principle applies as well to instruments partly pr
and partly written, as to those wholly printed or wholly wri
Barhydt v. Ellis, 45 N. Y. 107. Where two clauses apparentl
pugnant may be reconciled by any reasonable construction, as b

s a qualification of the other, that construction must be
it cannot be assumed that the parties intended to
stent provisions. Applying these settled rules to the
question, it is, we think, reasonably clear that the
not make any representation as to the contents of the
agent simply certified in effect that they were de-
ntaining eggs, accompanying this with the statement
ents were not in fact known. The plaintiffs in making
were chargeable with knowledge of the contents of the
and must be deemed to have relied upon the assurance
r as to the contents of the packages. The claim that
ontents unknown' referred simply to the kinds of eggs
untenable."

Statutes Making Recital of Receipt of Goods Conclusive
—A statute making a bill of lading conclusive evidence
erty was actually received by the carrier ws construed in
chants' etc. Co., 78 Md. 1, 26 Atl. 897, and was held not
he delivery of goods from one carrier to another in
h the state. And an act of Mississippi making "every
acknowledging the receipt" of goods conclusive evidence
of bona fide holders that the goods were actually re-
ansportation, was held not to apply to bills of lading
teamboat line, but not naming any particular boat: The
62 Fed. 407, 10 C. C. A. 454.

of Consignor as Warranty of His Right to Ship the
rrier in issuing a bill of lading for property delivered
sportation does not warrant the title of the shipper to
be transported: National Bank of Commerce v. Chicago
Minn. 224, 20 Am. St. Rep. 566, 46 N. W. 342, 560, 9
For various phases respecting the title to the goods
y the bill of lading, see the remaining sections of this

tion of Title as Being in Consignee.—The consignee is
the owner of the goods until the carrier is notified to
See monographic note to Chandler v. Sprague, 38 Am.
in other words, the consignee named in a bill of lading
the owner of the goods named therein: Webb v. Winter,
he Sally Magee, 3 Wall. 451, 18 L. ed. 197; Benjamin v.
n. 11, 38 N. W. 702; Butler v. Smith, 35 Miss. 457;
Oil Co. v. Steamer Red River, 106 La. 42, 87 Am. St.
outh. 303. The issuance of a bill of lading in the name
ee does not necessarily vest title in him, but it raises a
o that effect which may be controlled by special clauses
by evidence aliunde: Merchants' Ex. Bank v. McGraw,
22 C. C. A. 622. In Bank of Litchfield v. Elliott, 83
N. W. 454, it was held that as between parties other
er and the true owner or consignee, the bill of lading is

prima facie evidence of title which may be rebutted by evi
But it was held in Ryan v. Great Northern Ry. Co., 90 Minn.
N. W. 758, that as between the carrier of the goods and the ow
whom the same are consigned, the bill of lading is a reliable s
of title, and vests in the legitimate holder thereof the right t
possession of the property.

**g. General Effect Where Bill of Lading is Issued Through Fra
Mistake.**

1. When Issued Through Fraud or Mistake of Carrier.—Natu
the same rule prevails with respect to bills issued through the
or mistake of the carrier as prevail with respect to bills of l
issued for goods not actually received. Thus where the sh
negotiates a bill of lading fraudulently issued by the carrier's
upon goods not received, the carrier is not responsible to th
signee, since the fraud of the agent in that respect is outsid
scope of his employment: Friedlander v. Texas etc. Ry., 130 U. S
7 Sup. Ct. Rep. 570, 32 L. ed. 991; Baltimore etc. R. Co. v. Wil
44 Md. 11, 22 Am. St. Rep. 26. It was, however, held in Alabama
a bona fide purchaser of a false bill of lading from a person to
it had been issued by the carrier's agent, may hold the carrier
to the extent of advances made in it, but the decisions seem to
been based on a code provision making the carrier liable under
circumstances: Jasper Trust Co. v. Kansas City etc. Co., 99
416, 42 Am. St. Rep. 75, 14 South. 546. And it was held where
rier recites in its bill of lading that cotton is lying in a depot
certain place, and agrees to forward it from that place to the
signee, and a bank thereafter receiving the bill of lading ass
advances money on it in good faith, the carrier is estopped
showing that the recital as to the cotton having been at the spe
place was not true: St. Louis etc. R. Co. v. Larned, 103 Ill. 293.

2. Effect Where Consignor had No Title to the Goods.—A b
lading does not, it seems, represent the goods named in it unles
bill was issued to the true owner of the goods: The Idaho, 93
575, 23 L. ed. 978; Blossom v. Champion, 37 Barb. 554; Dows v.
rin, 16 N. Y. 325; Moore v. Robinson, 62 Ala. 537; Mechanics
Bank v. Farmers' etc. Bank, 60 N. Y. 40. See, also, note to Cha
v. Sprague, 38 Am. Dec. 422. And it seems that the shipper c
allege fraud or mistake in bills prepared by himself: Bersli
Houston etc. Ry. (Tex. Civ. App.), 80 S. W. 639.

In The Idaho, 93 U. S. 575, 23 L. ed. 978, the court said: "
hardly necessary to say that the title of the true owner of per
property cannot be impaired by the unauthorized acts of one no
owner. Taking possession of the property, shipping it, obta
bills of lading from the carriers, indorsing away the bills of la
or even selling the property and obtaining a full price for it can
no effect upon the right of the owner. Even a bona fide purc

ht by a purchase from one who is not the owner, or not sell."

stated in Moore v. Robinson, 62 Ala. 537, that although one of the most usual evidences of title to chattels, yet rule, mere possession will not enable a man to transfer than he has himself, or than he has been authorized to grant. See, also, Burton v. Curyea, 40 Ill. 320, 89 to the same effect.

ading fraudulently made, whereby the goods of one pped to or in the name of another, without the knowlnt of the former, will not enable the latter to transfer n to an innocent purchaser for value in the ordinary iness: Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. carrier is not liable to a third person for issuing a bill ne apparently having authority to ship the goods: See . Bank v. Laveille, 52 Mo. 380.

Where Consignor Obtained His Title to the Goods d.—A somewhat different question is presented when obtained the goods consigned from their true owner , or where he obtained them on a false line of credit.

eld, that if the seller of goods have a title, even though raud, a bona fide purchaser for value from such fraudof the title without notice of the fraud will be pro- v. Robinson, 62 Ala. 537; Dows v. Greene, 24 N. Y. to Williams v. Merle, 25 Am. Dec. 613. The rule was d in Michigan Cent. R. Co. v. Phillips, 60 Ill. 190. In consignor purchased a quantity of wine, agreeing to delivery, but being delivered late in the afternoon, inller to call the next morning to get his pay, but failed e wine, and consigned it elsewhere, drawing a draft ached to the bill, and discounting the draft at a bank. l that the bank, having no notice that the wine had not acquired a valid and binding lien on the property for dvanced by them.

illustrations, see the discussion with reference to the age in transitu.

ts of Assignee of Lost or Stolen Bills of Lading.

sion of the general principles of law with respect to the by bona fide purchasers of stolen property, see the note to Cochran v. Fox Chase Bank, 103 Am. St. Rep. monographic note to Chandler v. Sprague, 38 Am. Dec.

rule in this respect was set forth in Shaw v. Railroad 557, 25 L. ed. 961. It was there stated that the rule de purchaser of a lost or stolen bill or note indorsed in ble to bearer is not bound to look beyond the instru-

ment has no application to a lost or stolen bill of lading, an
if the purchaser of the bill of lading has reason to believe th
vendor was not the owner thereof, or that it was held to secu
outstanding draft, he is not then a bona fide purchaser.

The court in Raleigh etc. R. Co. v. Lowe, 101 Ga. 320, 28 S. I
in discussing the subject said: "As no sale of stolen goods, t
to a bona fide purchaser for value, can divert the ownership
person from whom they were stolen, it follows that the sale of a
bill of lading, the symbol or mere representative of the go
covers, can confer no title upon an innocent third person as a
the owner, or those claiming under him. Upon the same princi
a carrier delivers the goods upon a stolen bill of lading, it wi
be protected from liability to the owner as for a conversion, thou
bill be indorsed in blank, and the delivery made in perfect
faith. If, however, a bill of lading, duly indorsed, is stol
reason of the negligence or carelessness of the owner or his
the carrier in good faith delivering upon such bill of lading,
guilty of a conversion. See Friedlander v. Texas etc. R. R. Co
U. S. 424, 9 Sup. Ct. Rep. 570, 32 L. ed. 995; Shaw v. Railroa
101 U. S. 565, 25 L. ed. 894; Dows v. National Exch. Bank, 91
618, 23 L. ed. 214; Pollard v. Reardon, 65 Fed. 848, 13 C. C. A
3 El. & B. 635, and 4 Am. & Eng. Ency. of Law, 2d ed., p. 551,
this doctrine is recognized. In such cases the familiar principle
be applicable, that where one of two innocent parties must suf
the fraud of another, the loss should fall upon him who enable
third person to commit the fraud. Whether such negligence e
in a given case, of course, should be determined by a jury unle
evidence on this subject unequivocally demanded a finding one v
the other."

X. Rights of Assignee of Forged or Altered Bills of Ladin

a. In General.—The fact that the shipper was allowed to fill
of lading in his own handwriting, and that he left a blank
afforded opportunity for increasing the statement of the numl
bales shipped, will not render the carrier liable for a loss occa
by the forgery of the shipper in raising the bill of lading: L
v. Central R. R. etc. Co., 12 Fed. 595. The court in giving the r
for its holding observed that in issuing such documents as a l
lading, which may pass into other hands, every one has a ri
presume that the criminal laws of the land will protect the
from felonious alteration. Hence, a failure to take all preca
to prevent the felonious alteration of a contract in writing
negligence.

But, in this respect, see, also, the discussion of principles appl
to stolen bills of lading in the last preceding subdivision.

**b. Where Forged Warehouse Receipts were Used as a Bas
the Bills of Lading.**—In Armour v. Michigan Cent. R. Co., 65

Rep. 603, a bill of lading was issued by the carrier on the
tain forged warehouse receipts for the goods consigned,
were attached to a draft upon the consignees, which the
its acceptance by the consignee. The court held the car-
ble, but observed that the proposition would have been
cussion if the bill had been assigned. But in considering
this decision in other jurisdictions the position of the
ourts with reference to the liability of a carrier for its
e receipt of the goods, where no goods were actually re-
t be considered; the New York courts sustaining the
e on that proposition, as we have shown in subdivision

of Forged Bill of Lading Being Attached to Bill of Ex-
acceptor of a bill of exchange with a bill of lading at-
discounted by a bank to which it had been sent "for
is bound to pay the bill of exchange to the bank at
twithstanding that the signatures to the bill of lading
ies, where both the bank and the acceptor believed the
be genuine at the time of the acceptance: Goetz v. Bank,
1, 119 Sup. Ct. Rep. 318, 30 L. ed. 515. See, also, Hoff-
of Milwaukee, 12 Wall. 181, 20 L. ed. 366, which was
se, to the same effect.
hat the acceptor of a bill of exchange is chargeable with
of the drawer's signature and cannot recover money
rged signature, but if a material alteration be made in
the bill of exchange after it has been signed by the
the drawee is not guilty of any negligence, he may re-
paid on it in ignorance of the alteration, but not against
unless he has been negligent. Hence, applying this rule
bill of lading accompanying a bill of exchange as secur-
bill of exchange, it was held where a letter authorizing
o whom it is addressed to draw on the writers for any
ight buy in a certain city, provided that the bill of ex-
ccompanied by a bill of lading of the cotton, and that
of the bill of exchange would not exceed three-fourths
et price of the cotton, that the letter binds the writers
ny person who, on the faith of the letter, advances money
bill of lading accompanying a genuine bill of exchange.
the writers of the letter have paid the bill of exchange
by such forged bill of lading, they cannot recover the
the person who discounted the bill of exchange: Young
63 Ala. 519.
Nat. Bank v. Burkham, 32 Mich 328, it was held that
are not entitled to recover of the payee the amount of
xchange which they have accepted and paid, upon the
they paid it under a mistake of fact as to the nature
the security from the drawer and that the security proved

to be fictitious. Justice Cooley, in delivering the opinion, very p
nently suggested this question: "If a mistake regarding their
curity will authorize the drawees to recall the payment mad
the payee, no reason is perceived why a mistake regarding the
sponsibility of the drawer, or regarding his honesty and integ
or anything else upon which they relied for protection in t
dealings, should not justify the like action. If they suppose
drawer to be responsible when he is not, is not this as genuin
mistake of fact on their part as if they suppose a security t
good when it is fictitious?"

**XI. Rights of Assignee Where Carrier Delivers Goods to A
Without Requiring Production of Bill of Lading.**

A common carrier who delivers goods without requiring th
duction of the bill of lading is liable in trover for their v
a bona fide holder of the bill, for value, who obtained posse
the bill before the delivery of the goods at the destinatio
Nat. Bank v. Northern R. Co., 58 N. H. 203. The delivery
by a carrier to the consignee is generally made at his per
when made the consignee surrenders the bill of lading ma
dorsed to himself: Union Pac. Ry. v. Johnson, 45 Neb. 5
St. Rep. 540, 63 N. W. 144. Where by the terms of the l
ing the goods are consigned to the order of the assigne
bill is indorsed in blank and negotiated for value as sec
draft drawn by the consignor on a third person, the car
right to deliver the goods to such third person without
tion of the bill of lading or proper authorization: Bos
Bank v. Western etc. Co., 81 Ga. 221, 7 S. E. 125. Or,
by the court in Western etc. Co. v. Ohio etc. Trust Co.,
33 S. E. 821, in speaking on this subject: "One of the
of bills of lading is to enable sellers of goods to ob
on their shipments by drawing on the purchasers fo
the goods, attaching the bill of lading to the draft,
draft discounted by some bank which holds the bill
relies upon its terms as security for the payment of
carrier must have knowledge that the bill of lading
and thus get into the hands of a bona fide holde
to see that the goods are not delivered until the d
the bill of lading produced. To permit the rights o
faith and without notice, discounting a draft with
attached, and relying on the terms of the bill of l
to be affected by an existing arrangement or c
consignor, the purchaser or person to be notified
carrier, that goods should be delivered to the p
to be notified, or that he should have the right t
tination, without payment of the draft and pro
of lading would be a gross fraud upon the ba

result in preventing shippers getting advances in goods sold, by drawing for the purchase price, attaching draft to bill of lading, and having same discounted."

It will be observed that in the Georgia case just quoted from the court practically enlarges the scope of the carrier's business so as to include the burdens flowing from the banking features of bills of lading and making the carrier to a certain extent a collection agency. But however that may be, the decision of the court, in so far as it holds that it is a duty of the carrier to require the production of the bill of lading upon delivering the goods, is undoubtedly supported by the authorities.

But the carrier which delivers to the shipper, even on good faith, the consignment upon his surrender of a duplicate bill of lading is not relieved from his obligation to deliver the consignment to the indorsee for value of the original bill of lading, in the absence of any restriction or limitation upon the negotiable character of the bill of lading: Midland Nat. Bank v. Missouri Pac. Ry., 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521, and it was held in National Commercial Bank v. Lackawanna Transp. Co., 59 App. Div. 270, 69 N. Y. Supp. 396, affirmed in 172 N. Y. 596, 64 N. E. 1123, where the goods shipped under a bill of lading providing that the bill shall be surrendered upon delivery of the goods, are delivered to the lawful holder of the bill of lading without requiring the surrender of the bill, that the carrier is not liable as for conversion to a subsequent transferee of the bill of lading who obtains the bill without knowledge that the goods have been already delivered, since the bill of lading, being a "spent" bill, could not operate to pass title. The court, however, did not say that the transferee would not have a remedy in some other form of action. So, also, it was held in Anchor Mill Co. v. Burlington etc. Ry., 102 Iowa, 262, 71 N. W. 255, that the delivery of goods by the carrier on the order of the consignee, even without presentation of the bill of lading, to one who paid value therefor to the consignee, vests title in the goods as against one to whom, after such delivery, the consignee had transferred the bill of lading.

XII. Effect of Custom or Usage of Carrier upon Rights of Assignee of Bill of Lading.

No custom practiced and maintained by a carrier can prevail against the express language of his contract of affreightment to affect the rights of the holder by indorsement thereof or in anywise limit the liability of the carrier thereon, unless the indorsee has purchased or received the contract with knowledge of the custom: Midland Nat. Bank v. Missouri Pac. Ry., 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. Rep. 425, 27 L. ed. 325.

In Missouri Pac. Ry. v. McFadden, 154 U. S. 155, 14 Sup. Ct. Rep.

990, 38 L. ed. 944, the court held that if a railroad co
for its own convenience and that of its customers is i
habit of issuing bills of lading for cotton delivered to a
press company, to be compressed before actual delivery to th
road company with no intent, however, that the liability
carrier should attach before delivery on its cars, and the cot
destroyed by fire while in the hands of the compress compan
railroad company is not liable for its value to an assignee of t
with notice of the custom of dealing between the shipper an
rier, and the court very strongly intimated that the carrier
not be liable even if the assignee did not know of the afo
course of dealing with the shipper.

**XIII. Rights of Assignee of Bill of Lading as Against Carri
Failure to Deliver the Goods.**

Chief Justice Shaw in Blanchard v. Page, 8 Gray, 281, said: "
is no doubt that the party who was the owner at the time, or be
owner of the goods afterward by assignment of the shipper or
wise, and who was consignee, indorsee of the bill of lading, o
ful holder of a bill of lading in blank, and who really sustai
damage, may maintain an action against the ship owner, not b
he has any contract with him for the carriage, but becaus
ship owner has the goods lawfully in his possession, it has beco
duty to carry them safely and deliver them to the consignee, s
only to a lien for his freight and if the consignee is ready t
charge that lien by a payment or tender of that freight, the r
of the carrier to deliver the goods to such consignee is a
of duty, and a wrong done him, for which an action, either i
for the conversion or in assumpsit upon the implied promise t
form such duty, may be maintained."

**XIV. Rights of Assignee of Bill of Lading as Against the Ri
Stoppage in Transitu.**

We shall not enter into a discussion of the general rules in
to the right of stoppage save to advert to such as relate partic
to those cases in which the assignee of bills of lading are conc

In Morris v. Shryock, 50 Miss. 590, the court said: "The ri
stop goods in transitu is nothing more than the extension of th
which the vendor has on all sales for the price until after t
livery to the very point of the goods coming to the actual cust
the vendee or his agent. The vendee may defeat the right
vendor to stop the goods in transitu by a bona fide assignm
the bill of lading for value. And we are not aware that the
can be defeated in any other mode until the goods come to the
possession of the vendee."

And in Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am
299, the court observed: "By the rules of commercial law, b

egarded as symbols of the property therein described, and
of such bill by one having an interest in or a right to
property is equivalent to a delivery of the property it-
signor who has reserved the jus disponendi may effectuate
ledge of the property consigned, by delivery of the bill
ing) to the purchaser or pledgee, as completely as if the
ere in fact delivered. If such transfer of the bill of lad-
e after the property has passed into the actual possession
ignee, the transferee of the bill takes it, subject to any
n which the consignee may have acquired by reason of
on. But if the bill of lading be transferred by way of
ge to a third person, before the property comes into the
f the consignee, the consignee takes the property, sub-
right which the transferee of the bill may have ac-
he symbolic delivery of the property to him.

nciple on which the title to goods may be transferred by
f the bill of lading is wholly distinct from that on which
f stoppage in transitu rests. The right to stop goods in
ts only where the vendor has consigned them to the
r circumstances which vest the title in the buyer. The
goods by delivering the bill of lading can be made only
ere the vendor has not parted with the title."

ading English case of Lickbarrow v. Mason, 2 Term Rep.
held the consignor may stop goods in transitu before
to the hands of the consignee in case of the insolvency
ignee, but if the consignee assigns the bill of lading to
on for a valuable consideration, the right of the consignor,
such assignee, is devested.

in the very recent case of Delta Bag Co. v. Kearns, 112 Ill.
he court said: "The right of stoppage in transitu as be-
seller and buyer of personal property arises upon the in-
the latter, and continues until the carrier actually de-
goods to the buyer, or upon his order, or to a bona fide
holding a bill of lading duly indorsed by the buyer. A
of the buyer without an actual delivery of the goods or
ent of the bill of lading, therefore, does not defeat such
ppage: Benjamin on Sales, secs. 836, 862; Angell on Car-
40, 341; Hutchinson on Carriers, sec. 409; 2 Redfield on Rail-
10, 11, p. 109; Harris v. Hart, 6 Duer, 606; Mohr v. Boston
o., 106 Mass. 67; 23 Am. & Eng. Ency. of Law, 1st ed., 930,
ited; Sherman v. Rugee, 55 Wis. 346, 13 N. W. 241; O'Brien
16 Md. 122, 77 Am. Dec. 284; McElwee v. Metropolitan
., 69 Fed. 302, 16 C. C. A. 232; Pattison v. Culton, 33 Ind.
Rep. 199."

n the principal case (National Bank of Bristol v. Baltimore
ante, p. 321), it was held if a vendee of property takes
f and ships it by railroad, receiving a non-negotiable bill

of lading, which he subsequently assigns to a purchaser or pl
in good faith and for value, the vendor has thereafter no rig
stoppage in transitu.

Although the right of stoppage in transitu may be defeated
sale to a third person, and an indorsement of the bill of ladi
good faith, for a valuable consideration, yet a sale made fraudul
without consideration, for the purpose of defeating the right,
not operate to defeat the right: Rosenthal v. Dessau, 11 Hun
And where a consignor obtains a bill of lading to a shipment of
without authority of the owner, a transfer of the bill of sale wil
defeat the title of the original owner or affect his right to sto
goods in transit: Evansville etc. R. R. Co. v. Erwin, 84 Ind. 457

Sometimes the consignee directs the consignor to ship the
directly to the customer of the consignee who has no privity wit
consignor. The case of Memphis etc. R. Co. v. Freed, 38 Ark.
was an instance of that sort. In that case a merchant at a
called Dardanelle ordered from a firm of merchants at St. Louis
of drygoods. The St. Louis firm transmitted the order to an
merchant firm at New Orleans, with directions to ship the goo
the Dardanelle merchant and send the invoice and bill of ladi
them. The New Orleans firm shipped the goods as directed,
charged them to the St. Louis firm, who in turn charged them t
Dardanelle merchant. The invoice and bill of lading were sent t
St. Louis firm. During the transit, the St. Louis firm failed, an
New Orleans firm, claiming the right of stoppage in transitu,
manded the goods from the railroad company which delivered t
The Dardanelle merchant sued the railroad company for the val
the goods for not delivering them as contracted in their bill of
ing. The court, after a thorough consideration of the subject,
that the New Orleans firm were not the vendors of the Darda
merchant, and that no privity existed between him and them,
that they had no right to stop the goods, and that the railroad
liable for the value of the goods. In connection with this phas
the subject, see, also, Feise v. Wray, 3 East, 93, Stubbs v. Lu
Mass. 453, 5 Am. Dec. 63, and Eaton v. Cook, 32 Vt. 58, all of w
have a strong bearing on the law of the case.

In Treadwell v. Aydlett, 9 Heisk. 338, a firm of commission
chants purchased from a firm of wholesale grocers a bill of groce
and directed the same to be shipped to a certain customer of th
but directed the groceries to be shipped in their (the commission
chants') name as consignors. Before the groceries reached t
destination the commission merchants became insolvent and
wholesale grocers sought to stop the goods in transit, but the c
held that in taking the bill of lading in the name of the commis
merchants, they recognized their right to control the goods as ow
and their right to consign them and vest the title in the consig

holesale firm sells a bill of merchandise to another firm
nd ships them in the usual course of business to the
onsignees under a bill of lading, in the usual form, and
, becoming insolvent while the goods are in transit, trans-
of lading, several hours after the carrier had been notified
gnors to stop the transit, to a firm of auctioneers and
s, who in good faith and without knowledge of the in-
of the notification to stop the transit of the goods, ad-
to the consignee to be repaid out of the proceeds of the
sold at auction, the assignee, on tender of the freight
is entitled to receive the goods from the carrier as
onsignor: Newhall v. Central Pac. R. Co., 51 Cal. 345, 21
.

er of a bill of lading by the consignee by way of pledge
al security for a loan, though it may not absolutely de-
er's right of stoppage in transitu, prevents him from
t right as against the transferee until he has discharged
red by the transfer, and this rule applies where two bills
e marked "original," and the other "duplicate," are
ailroad company for the same goods, and the bill of lad-
"duplicate" is transferred by the consignee who holds
e to bona fide assignee for value as collateral security:
. Ry. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861,
And as against the right of a vendor to stop goods in
nk to which the vendee has transferred the bill of lad-
ty is a holder for value, even though the transfer was
sting debt or to "cover" advancements by the bank
promise of the assignor that he would "cover" the ad-
assignment of the bill of lading in controversy: First
Schmidt, 6 Colo. App. 216, 40 Pac. 479.
ssion of some of the earlier decisions as to when an in-
a bill of lading will defeat the right of stoppage in
the notes to Hause v. Judson, 29 Am. Dec. 392, and
novan, 19 Am. Rep. 91.

**and Liabilities of Assignees Where the Bill of Lading
panied by a Bill of Exchange, or Assigned as Collateral
to Advances.**

Nature of the Assignment Under Such Circumstances.—
on has arisen among the authorities with respect to as-
bills of lading when accompanied by bills of exchange
price of the goods or a portion of the price. It seems
companied by a bill of exchange for the full price, and
change is discounted by a bank crediting the amount of
change to the account of the assignor of the bill of lad-
transaction is regarded as practically a sale to the dis-
. But, of course, the true nature of such transaction

is always a matter of intention of the parties; and this intention must be determined by commercial usages. The beneficial results to the commercial world from an unhampered use of bills of lading in bank transaction is so apparent that it has led the courts to look with great favor upon the quasi negotiable character of such instruments. Thus in National Bank v. Merchants' Nat. Bank, 91 U. S. 92, 23 L. ed. 208, it was held that the owner of a bill of lading who has become such by indorsement and by discounting the bill of exchange drawn against the goods, succeeds to the rights of the shipper. He has the same rights to demand acceptance of the accompanying bill of exchange and no more, and, consequently, if the shipper cannot require such acceptance without surrendering the bill of lading, neither can the holder: See Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 Tex. 626, 97 Am. St. Rep. 944, 75 S. W. 292, to the same effect. The general rule is said to be that the transfer of a bill of exchange with a bill of lading attached gives to the transferee a limited and qualified interest in the property covered by the bill of lading, this interest being to secure the indorsee of the draft in its payment: Lee v. Bowen, 5 Biss. 154, Fed. Cas. No. 8183; Halsey v. Warden, 25 Kan. 136; First Nat. Bank v. Crocker, 111 Mass. 163; First Nat. Bank v. Dearborn, 115 Mass. 223, 15 Am. Rep. 92; Davenport Nat. Bank v. Homeyer, 45 Mo. 149, 100 Am. Dec. 363; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299. In an early case in New York (Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290), the court said that the discounting of a draft accompanied by a bill of lading, might be regarded as a sale of the goods to the discounting bank, in trust to deliver the goods to the original vendee in case he accepted the draft, or in case he refused to accept, then in trust to sell the goods and pay the draft, but the court also observed that the transaction might also be regarded as a pledge or mortgage of the goods.

In Dodge v. Meyer, 61 Cal. 405, the court after a discussion of the subject, said: "It thus appears to be established as a correct rule that a person purchasing a draft drawn by the shipper of the goods with a bill of lading accompanying it, has a special property in the goods covered by the bill of lading; usually in the case of a time draft this special property vests in the purchaser of the draft as security for its acceptance. It may be, if so agreed between the shipper and the purchaser of the draft, that the purchaser will have a right to retain the bill of lading and thus retain his special property in the goods shipped not only for acceptance, but for the payment of the draft: Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Dows v. Greene, 24 N. Y. 638; First Nat. Bank v. Kelly, 57 N. Y. 36, and cases there cited; Lanfear v. Blossman, 1 La. Ann. 153; Dows v. National Ex. Bank, 91 U. S. 618, 23 L. ed. 214; National Bank v. Merchants' Bank, 91 U. S. 95, 23 L. ed. 210; Fifth Nat. Bank of Chicago v. Bayley, 115 Mass. 229; Mason v. Hunt, 1 Doug. (Eng.) 299.

All these cases hold that the indorsee of the bill of lading who has purchased the draft, accompanied by such bill of lading, has a special property in the goods, and has the bill of lading and the shipment it represents for its security."

In Farmers' etc. Bank v. Logan, 74 N. Y. 568, it was said that a bill of lading confers upon the person in whose favor it is issued, or to whom it is transferred, the title to the goods, even though the transaction is not intended to give the permanent ownership, but to furnish security for advances of money or discount of commercial paper made upon the faith of it.

So, also, in Lee v. Bowen, 5 Biss. 154, Fed. Cas. No. 8183, it was said that the bona fide holder of a draft drawn against goods shipped with bill of lading assigned has a lien upon the goods in the hands of the consignee, and can recover from him the proceeds of their sale, even though the consignor is indebted to the consignee on a general account. And in Jones v. Brewer, 79 Ala. 545, it was held where a manufacturer fulfills an order for goods by taking the bill of lading in his own name, attaching to it a sight draft for the price, and indorsing it to the carrier's agent at the point of destination with directions to "please deliver to bearer on presentation," that an intention is shown on the part of the vendor to retain title until payment of the purchase price, and a loss before delivery to the purchaser must be borne by the seller.

b. Rule Where the Bill of Exchange is Purchased or Discounted by the Assignee of the Bill of Lading.—The legal effect of a discounting transaction between the assignor of a bill of lading and a bank to which it assigns the bill of lading accompanying the bill of exchange which is discounted depends upon the intention of the parties so far as that intention is disclosed, or can be discovered from the nature of the transaction: Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. 151. Hence, as we have seen in the preceding section, the courts are fairly well settled in holding that the assignee under such circumstances is entitled to at least a special property in the goods represented by the bill of lading, to the extent of reimbursing it for the amount advanced to the consignor.

In Commercial Bank v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311, the court said: "The discount of a draft drawn by consignor upon his consignee, which is accompanied by the delivery of a bill of lading to the party making the advance passes to such party not only the legal title to such property, but, in the eye of the law, the transfer of the bill of lading is regarded as an actual delivery and an actual change of possession of the property."

So, also, in Fifth Nat. Bank v. Bayley, 115 Mass. 228, the court, in a discounting transaction, said: "The delivery of those bills of lading to the plaintiff corporation as collateral security for the payment of its advances, although it would not have enabled it to sue the carrier upon the contract therein made with the shipper, yet did transfer at

least a special property in the goods to the plaintiff (for whicl discount of the drafts was a valuable consideration), and gave right of immediate possession, sufficient to maintain replevin ag the shipper or anyone attaching the goods as his property."

And in Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 21 was held that a party discounting a bill of exchange and recei therewith, deliverable to his order, a bill of lading of the g against which the bill of exchange was drawn, acquires a sp property in the goods, and has a complete right to hold then security for the acceptance and payment of the bill of exchange: Hathaway v. Haynes, 124 Mass. 311, to the same effect.

Where a bill of lading for goods with a draft on the buyer was livered to be discounted by a banker, the banker acquired the r to the exclusive possession of the goods and a right of propert them, as security for the amount advanced even as against the sell attaching creditors: Mathes v. Gordon, 77 Conn. 341, 59 Atl. See Halsey v. Warden, 25 Kan. 128; Neill v. Rogers Bros. Produce 41 W. Va. 37, 23 S. E. 702.

Where a bill of lading drawn to the order of the consigno assigned by him to one who discounts a draft accompanying the it is a strong presumption that the consignor intended that no to the goods should pass to the vendee until acceptance or paymen the accompanying draft: Dows v. National Exch. Bank, 91 U. S. 23 L. ed. 214; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W.

In the last-cited case, a merchant having received an order goods, shipped them to their destination, but consigned to himsel order. He drew a bill of exchange for their price upon the pe ordering them, payable to his order thirty days after sight. Att ing the bills of lading indorsed in blank to the drafts, and indor the drafts in blank, he discounted them at a bank, it being agree parol with the bank that the bills of lading should not be deliv to the drawee until the drafts were paid. The court held that i pendent of the parol agreement, and considered as a matter for l interpretation, the transaction did not import a sale of goods credit, or that the drawee was entitled to the bills of lading u his acceptance of the drafts without payment. And in American Bank v. Henderson, 123 Ala. 612, 82 Am. St. Rep. 147, 26 South. it was held if a consignor draws upon the consignee for the purcl price of the goods shipped, and the draft with bill of lading is dorsed and transferred to a third person, who discounts the draf special property in the goods thereby passes to such transferee, ject to be devested by the acceptance and payment of the draft; if the consignee refuses to accept and pay such draft, the title to property in transitu under the bill of lading becomes absolute in as against the consignor and his creditors.

And where a vendor takes the bill of lading to himself, indo it in blank, and, attaching it to a sight draft on the purchaser,

bank, obtaining credit at the bank for the amount of
the draft and bill of lading are forwarded to the vendee
draft and accepts the bill of lading before the transit
s completed, the title to the goods passes to the pur-
e delivery of the bill of lading, and places the risk of
of the transit in the vendee: Forcheimer v. Stewart, 65
Am. Rep. 30, 22 N. W. 886. In this general connection,
Nat. Bank v. Mt. Pleasant Mill Co., 103 Iowa, 518, 72

bank has discounted a draft with a bill of lading at-
held that the goods thereby become the property
such an extent that they are not subject to the claim
f the shipper: Temple Nat. Bank v. Louisville etc. Oil
S. W. 253; Sabel v. Planters' Nat. Bank, 110 Ky. 299,

ere Bill of Lading is Held Merely as Collateral Security
—The indorsement and delivery of documents constitut-
ding in consideration of advances of money in the usual
e, transfer the legal title and constructive possession
y: Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123. In
cited, the court said: "Nor, as respects the legal title,
any distinction between the advance made by Gibson
of an actual purchaser. To the extent of his advances
ser, and the legal title was conveyed to him to protect
It is not like the lien of a factor, who makes advances
al upon goods in his possession. But even in that case,
annot be withdrawn from his hands until his advances
But in the case before us, the title of Gibson is not a
e legal title, the right of property, passed to him, and
cKay retained nothing but an equitable interest in the
remained after satisfying the claims of Gibson."
ipper consigns grain to himself, and receives the bill
while the goods are in transit obtains a delivery of the
elf at an intermediate point without being obliged to
bill of lading, the carrier is responsible to a pledgee
money in the usual course of business upon a pledge of
ding, made before the time at which the goods could
at the original destination: Ratzer v. Burlington etc.
n. 245, 58 Am. St. Rep. 530, 66 N. W. 988. The court,
reasons for its decision, observed that "a vast portion
e of this country is moved from the agricultural dis-
commercial centers and the seaboards by the aid of
e on the security of such bills of lading. A well-estab-
has grown up in commercial circles by which such bills
treated as the symbols of title to the property in tran-

sit, are taken as security for money advanced and indorsed an
livered as a transfer of the property. This is well understood b
railroad companies and everyone else. To allow the railroad
panies to ignore this custom would be to destroy the custom i
This would cause great hardship, revolutionize business methods,
drive all buyers and shippers of small means out of the busines
they could no longer give ready and available security on commo
in transit, and thereby turn their limited capital sufficiently qu
and often enable them to do much business.'' But in a later ca
that state, involving a grain shipment, it was held where a sh
who had forwarded a car of grain, and received a bill of lading t
for, with intention to vest the title of the property in the consi
(a third person), at the time the grain was delivered to the ca
hypothecated the bill of lading to secure the payment of a
companying draft, which was cashed at the shipping point, the
cashing the draft obtained no right to the grain described in th
of lading: Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W.
The court in this case adverted to the custom of using bills of la
as security, but observed that while the custom was of eviden
value, it should also be remembered that the banks may protect t
selves from fraudulent practices by seeing that the consignor
signs the goods to himself.

The rights of a pledgee of the bill of lading to a cargo of je
beef and garlic on board a Spanish merchant vessel captured
prize by the United States navy during the late war with Spain,
passed upon in The Carlos F. Roses, 177 U. S. 655, 20 Sup. Ct. Rep.
44 L. ed. 929, and it was there held that the pledgee obtains the
title in such cases only if such is the intention of the parties and
intention is open to explanation even as against persons who
have innocently paid value for the bill of lading. Chief Justice
ler, in discussing the general rights of persons holding bills of la
as collateral security, said: ''Generally speaking, in the purchase
shipment of goods on bills of lading attached to bills of exch
drawn against them, the bill of exchange is drawn on the consi
and purchaser and sent forward for collection through the bank
the place of shipment, who advances on the draft, and there
realizes on it through his correspondents, or by sale as exchang
the banker at some other point, or at the general exchange ce
may be the drawee of the bill of exchange instead of the consi
or real owner, the banker standing in the place of the owner, in v
of some arrangement with his customer, or on the faith of a run
account, the pledge of other securities, or the customer's per
liability, so that the draft may be charged up at once, and a
events, the control of the goods is not the sole reliance of the ba

''In the case at hand, the captors succeeded to the enemy ow
rights, and could have introduced evidence as to the real nature o
transactions, and so have rebutted any presumption in favor of

urchasers for value, and although they did not do this, still remains that in prize courts it is necessary for show the absence of anything to impeach the transaction, to disclose fully all the surrounding circumstances.'' it is said in a general way that the indorsement and bill of lading as collateral security for the payment of ying draft vests in the bank the title to the cargo: nor, 45 Vt. 196. And that where a bill of lading is at- draft as security for its payment and transferred for a sideration, it is an appropriation of the property con- bill whether it is indorsed or not: Holmes v. Bailey, 92 And it is also said that the owner of a bill of lading it as collateral security for a debt, but that the title is vested in the pledgee, though he acquires a lien which long as he retains possession, either actual or symbolical: People's Bank, 86 Ky. 176, 9 Am. St. Rep. 276, 5 S. W. here the vendor consigns goods to the purchaser, but in- tain control over them, draws upon the purchaser for the ing the bill of lading to the draft, which is transferred ee for a valuable consideration, the consignee, upon re- goods, takes them subject to the right of the holder of ading to demand payment of the draft, and he cannot ice of the goods on account of a debt due him from the mery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. , where the consignee of grain surrendered bills of lading ht agent, and took certified orders therefor, and obtained m a bank on the security of drafts accompanied by the rs, it was held that the title to the grain was transferred National Newark Bkg. Co. v. Delaware etc. Co., 70 N. 3 Am. St. Rep. 825, 58 Atl. 311, 66 L. R. A. 595. And k acted as commercial correspondent, advancing money or respondent for the purchase of fruit, and taking bills of urity for such advances, the title to the goods was held e bank subject to a contract on its part to sell the same spondent on receipt of the purchase price: In re Mc- App. Div. 131, 86 N. Y. Supp. 326. See, also, Drexel v. . Y. 129, 30 N. E. 732. And the fact that a bank which a draft with a bill of lading attached as security for a purchase of goods shipped had obtained a guaranty from that the draft would be paid does not release its lien as bill of lading, and the bank may enforce the same as taching creditor of the borrower: Shaffer v. Rhynders, 116 N. W. 1099. And it is also said that the transfer of a g by way of pledge or as collateral security for a loan, y not absolutely defeat the seller's right of stoppage in vents him from asserting that right as against the trans- he has discharged the debt secured by the transfer:

Missouri Pac. Ry. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 17 S. W. 608. And the delivery of an unindorsed bill of lading shipper as security for advances made transfers title to the prop described therein, to the pledgee where no opposing claim arise the part of the carrier, consignee, or a prior indorsee: Lewis v. Sp ville Bkg. Co., 166 Ill. 311, 46 N. E. 743. And where the vendo goods ships them, taking from the carrier a bill of lading to del to his own order, and then draws a draft payable to his own o upon the vendee, attaching the bill of lading, and indorses to third party such draft for value, the title to the goods vests in indorsee at least to the extent of the amount advanced: Willard Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026.

And where a merchant ships goods to his broker for distributio others and sends to the broker a bill of lading indorsed in blank, possession of which by general custom of trade is regarded as dence of the right to dispose of the property, he cannot recover goods from a bank which has in good faith taken the bill of la as security for a loan to the broker on his undivided account, converted the goods upon default in the payment of debt: Commer Bank v. J. K. Armsby, 120 Ga. 74, 47 S. E. 589.

And where a bank advanced money on a draft, taking as security attached bill of lading properly indorsed, and after a levy on goods as the property of the consignor, filed a claim thereto, its r to maintain this claim was not lost merely because while the cl was pending the drawee refused to accept the goods and pay draft, and in consequence the bill of lading was "indorsed over" the consignor for the sole purpose of having him dispose of the g for the bank's exclusive benefit: Coker v. First Nat. Bank, 112 Ga. 37 S. E. 122.

d. **Rule Where Bill of Exchange Accompanied by Bill of Ladin Sent to a Bank Merely for Collection or Acceptance.**—Where the dorsement of the bill of exchange and bill of lading show that purpose of the indorsement is merely for collection, we do not prehend that the rule as to the interest of the collecting bank agent would be any different than that which obtains with resp to ordinary commercial paper sent under similar circumstances.

But where a bank discounts a bill of exchange with a bill of lad attached by crediting the drawer's account with the amount, less discount charges for collection, and in the event of not being a to collect the bill of exchange debits the drawer's account with amount of the bill of exchange, a question has arisen as to whet the bank purchased the bill of lading or whether it merely held for the purpose of delivering it to the drawee upon payment of bill of exchange. It was held in Cotton Mills v. Weil, 129 N. C. 4 40 S. E. 218, that the bank under such circumstances was only agent for collection. A very clear statement of the rule with resp to other commercial paper under similar circumstances was made

cking Co. v. Davis, 118 N. C. 548, 24 S. E. 365, and Boykin
18 N. C. 566, 24 S. E. 357, the rule there announced being
effect as held in the above-cited case.

held that a bill of lading deliverable to the order of the
l attached to a draft drawn upon the purchaser, and sent
'for acceptance and collection,'' with no other instructions,
y delivered by the bank on acceptance of the draft, and
to the goods, and the bank need not hold the draft until
t. Paul Roller Mill Co. v. Great Western Dispatch etc. Co.,
. And where the consignors of cotton took bills of lading
n name and sent them with draft for the price to a corres-
collection, and the purchaser of the cotton paid the draft
which was honored by the bank under an agreement with
of the check to take the bills of lading as security, it
hat the bills of lading did become functus officio in the
e bank, but still represented the cotton on which it had
der the agreement with the purchaser: First Nat. Bank
onio etc. Ry. (Tex. Civ.), 72 S. W. 1033, 97 Tex. Supp. 201,
10.

rsement ''for collection'' by a bank on invoices accom-
ls of lading attached to drafts is not a guaranty that the
ing are genuine. It is simply a notification that the goods
eld for the draft if it is not accepted: Goetz v. Bank, 119
Sup. Ct. Rep. 318, 30 L. ed. 515. In Newcomb v. Boston
ation, 115 Mass. 230, the railroad receipt recited the same
onsignor and consignee; an order to deliver to the pur-
he goods or his order was indorsed on the receipt, and it
a bank for collection. The purchaser went to the bank
ed the draft, and afterward sold the goods to another. At
of the purchaser of the goods, a commission man paid
at the bank, and obtained the receipt or bill of lading,
thereupon indorsed to the commission man under an agree-
ll and deduct his commission. The court held the com-
n had a special property in the goods, and that the original
had no such title that he could sell, and that the carrier
for turning over the goods to anyone other than the com-
n.

anics' etc. Bank v. Farmers' etc. Bank, 60 N. Y. 40, the
ther with the bill of lading, was sent to a bank for col-
o meet the draft the purchaser of the goods made his
le to the bank's president, which note was discounted by
the bank at the time receiving an indorsement of the bill
s security for its part in the transaction. The court said:
ery of the bill of lading to the plaintiff was a good symbol-
ry of the grain, and the plaintiff [the bank] thereby ac-
en upon it or title to it, and was fully authorized to hold
e loan was paid.''

If bills of lading, taken to the order of the consignor, with time drafts thereto attached, are indorsed to the cashier of a l through which they were to be transmitted for collection, there presumption of any authority on the part of the bank to surr the bills of lading upon acceptance of the drafts or otherwise upon their payment, and if the bank makes such a delivery, it i authorized and does not pass the title to the property describ the bills of lading: Bank v. Cummings, 89 Tenn. 609, 24 Am. St. 618, 18 S. W. 115. But see, also, National Bank v. Merchants' Bank, 91 U. S. 92, 23 L. ed. 208; Lanfear v. Blossom, 1 La. Ann. 45 Am. Dec. 76, and Schuchardt v. Hall, 36 Md. 590.

e. **Effect of Failure of Consideration Between Consignor and signee After Acceptance or Payment of the Bill of Exchange Ac panying Bill of Lading.**—The subject of this section was exhaust considered in the recent monographic note attached to Hall v. K 91 Am. St. Rep. 212, and we advert to the subject at this time m to call attention to the fact that the conclusions announced in note have been approved by the supreme court of Texas in the recent case of S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 626, 97 Am. St. Rep. 944, 75 S. W. 292. The authorities, as stated in the note on that subject, are very meager, and the min rule was based principally upon the authority of Finch v. Gregg N. C. 176, 35 S. E. 251, 49 L. R. A. 679, and Landa v. Lattin, 19 Civ. 246, 46 S. W. 48. The doctrine set forth in Landa v. La was distinctly disapproved in the opinion of the Texas supreme above referred to.

XVI. Right of Assignee to Sue.

Of course, the right of the assignee to sue is dependent upo nature of the rights which he is seeking to assert. In Dodg Meyer, 61 Cal. 405, it was held where a shipper, having right of erty in the goods, indorses and delivers the bill of lading, th dorsee may, as a general rule, maintain an action for the goo his own name. And in Robinson v. Memphis etc. Ry. Co., 9 Fed. it was held the indorsee of a bill of lading for value may not sue for the goods, but he may, in his own name, sue the carrie nondelivery. But in Knight v. St. Louis etc. Ry., 141 Ill. 11 N. E. 543, it was held that an assignee of a bill of lading canno in his own name for failure to transport and deliver goods acco to the contract, since bills of lading are non-negotiable and his r under an assignment are not greater than they would have bee der a bill of sale. In First Nat. Bank v. Dearborn, 115 Mass. 21 Am. Rep. 92, it was held that one holding a bill of lading as sec for advances could maintain replevin against an officer who s ward attaches them upon a writ against the general owner. See, Merchants' Ex. Bank v. McGraw, 76 Fed. 930, 22 C. C. A. 622. in Merchants' Bank v. Union etc. Co., 69 N. Y. 373, a person ho

l of lading as security for advances was held entitled to
ction against the carrier for failure to deliver the goods
the bill of lading.

What Law Governs Construction of the Assignment.

rincipal case it was said that where there is no evidence
aws of another state in which a bill of lading was issued,
will presume that as to bills of lading the common law
that state, and accordingly it held that a bill of lading
a contract between a shipper and a railroad company issued
has such qualities as are imposed upon it by the laws of
In Hunt v. Mississippi etc. Ry. Co., 29 La. Ann. 446, the
that where it was not advised that the law of Mississippi,
bill of lading was signed, was different than the law of
where the goods were to be delivered, the legal presump-
obtain that the laws of Mississippi were similar to Louis-

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CLARK v. KNOWLES.

[187 Mass. 35, 72 N. E. 352.]

FOREIGN CORPORATIONS.—A Bill in Equity to Enfor Personal Liability of Stockholders in a corporation on a clai reduced to judgment cannot ordinarily be sustained beyond the where it was organized. (p. 378.)

FOREIGN CORPORATIONS.—The Personal Liability Stockholder in a Colorado Corporation cannot be enforced by a equity in Massachusetts to which the corporation and the other holders are not parties. (pp. 379, 380.)

CONFLICT OF LAWS—Laws of Another State, When w be Followed.—The mode of procedure to enforce the liability of holders of a foreign corporation depends on the law of the state the remedy is sought. That state will not give effect to the prov of a statute of the state where the corporation was organized, calls for remedies which, according to the rules of practice law of the forum, cannot be given for want of necessary p (p. 380.)

Bill in equity by the creditors of a Colorado corporati enforce a statutory liability. The demurrer to the bill wa tained in the superior court, and the plaintiffs appealed.

H. W. Hervey, for the plaintiffs.

E. D. Stetson, for the defendant.

36 KNOWLTON, C. J. The plaintiffs, four hundred twenty-five in number, averring that they are the only k creditors of the Colorado State Bank of Grand Juncti corporation, bring this bill, in behalf of themselves an other creditors, against the defendant as a stockholder i bank. It is alleged that the corporation is insolvent, tha ceedings to wind up its affairs have been taken, that a re

ppointed under the laws of Colorado, and that cer-
nds have been paid. It is said that a large amount
ness is still unpaid, while there is but little property
oration that can be used to pay it.

ute of Colorado, found on page 264 of the Session
85, is as follows: "Section 1. Shareholders in banks,
ks, trust, deposit and security associations, shall be
dually responsible for debts, contracts and engage-
aid associations, in double the amount of the par
e stock owned by them respectively."

rred in the bill that the construction, interpretation
g of this statute, as determined by the court of last
olorado, are in substance as follows: "Each share-
ecord at the date of the bank's failure is individually
ly liable for the debts and obligations of the bank in
equal to twice the par value of the stock so held by
is liability is in addition to and independent of any
account of his original subscription for the stock.
ty in double the par value of his stock, is in the
dditional security to the creditors in dealing with the
onstitutes a fund for the benefit and protection of all
It should properly be recovered in an action brought
more of the creditors for the common benefit of all
Neither the bank nor the assignee is interested in
nor can either enforce the liability, nor is either a
ecessary party to any action brought to enforce such
The aforesaid fund is exclusively for the benefit of
itors, and forms no part of the assets of the corpor-
ile in the first instance the assets of the bank or
may constitute the primary or regular fund for the
corporate liabilities, when by reason of dissolution
cy an action against the corporation would be un-
when the remaining assets, if any, consist of worth-
ubtful claims, or claims in litigation, the creditors
quired to wait the collection of such. The share-
st pay promptly and take upon themselves the onus
to all such claims, looking to the assignee for what-
e realized on the remaining assets."

tute, so interpreted, apart from the statement that
bank nor the assignee is a necessary or proper party
n brought for recovery under it, of which we will
particularly later, shows that on the establishment
orporation, a fund is created in addition to the assets
oration, as a guaranty to creditors that the corpo-

ration's debts will be paid. It is to be collected for th
tection of all creditors, each one of whom has an interest
While each stockholder is individually and severally liab
the payment of his share, his liability is like that of all
stockholders, and ultimately each should pay only his
proportion, according to his ownership of stock. But th
bility outside of and in addition to the liability of the co
tion itself, is only collateral to it, the corporation being
the primary obligation to pay. It follows that if the stoc
ers, or any of them, should pay corporate debts more th
excess of the indebtedness above the amount which the as
the corporation are sufficient to pay, they could recover ba
excess of their payment from the corporation; or if any
the stockholders should pay more than his proper proporti
would have a right to a contribution from other stockhold
reduce his loss to its proper proportion. In all essential
ulars, therefore, in reference to the proper mode of giv
remedy and of adjusting the rights of the parties in in
this statute calls for procedure similar to that referred
many cases, namely, by a suit in equity to which the co
tion is a party, brought for the benefit of all the creditors a
all the stockholders: Hadley v. Russell, 40 N. H. 109; Er
ss v. Nesmith, 4 Allen, 233; Post v. Toledo etc. R. R
144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540; New
Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 7
773; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. Rep. 2
L. ed. 380; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. Re
47 L. ed. 839; Terry v. Little, 101 U. S. 216, 25 L. ed.
Elkhart Nat. Bank v. Northwestern Guaranty Loan C
Fed. 252, 30 C. C. A. 632; Marshall v. Sherman, 148 N.
51 Am. St. Rep. 654, 42 N. E. 419, 34 L. R. A. 757.
arily such a bill cannot be maintained elsewhere than
state where the corporation is organized. There must be
diction of the corporation as well as of the stockholders.
general principles which lie at the foundation of the de
in the cases above cited are controlling in the present
Accordingly, it was held in Bates v. Day, 198 Pa. St. 5
Am. St. Rep. 811, 48 Atl. 407, a decision under the
now before us made since the decision in Zang v. Wya
Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565, interpreti
statute, that the personal liability of a stockholder in Pe
vania could not be enforced by a bill in equity, becau
corporation and the other stockholders were not made

A like decision was made by the supreme court of nd in Miller v. Smith, 26 R. I. 146, 58 Atl. 634, also since the decision in Zang v. Wyant, the lan- he court being in part as follows: "The Colorado templates a proceeding in equity in that state by the f the corporation against all the stockholders there- purpose of establishing a pro rata liability, and until eding has been had this court cannot justly enforce against a single stockholder."

ence to the statement in the bill that, under the de- e supreme court in Colorado, neither the corporation signee is a proper party to the bill, we do not under- the court has so decided. We understand the de- red to in the bill is that in Zang v. Wyant, 25 Colo. n. St. Rep. 145, 56 Pac. 565, and we understand that have gone on the ground that the defendants had ir right to set up a want of proper parties by an- er after the demurrer.

ve take the statement of the bill to be correct, as are bound to do on this demurrer, it being a state- law of another state, the result is the same. Except part of a single sentence which we have quoted, in o the necessity or propriety of making the corpora- y, there is nothing in the bill which indicates that construction of the statute is different from our of it already made. In all other particulars there tion about the meaning of the act according to the on referred to in the bill. It is a familiar rule of n equity that all persons interested in the subject he suit shall be either plaintiffs or defendants, that of all may be settled, complete justice be done, and gation prevented. This rule makes it necessary in have all the stockholders joined as defendants. It qually necessary to join the corporation, or its repre- he assignee. To say nothing of the importance of to defend against the claims of creditors the party e has knowledge of them, a court of equity will not stockholders to go to trial and submit to a decree claims against them, and leave the corporation at show that the claims are groundless when the stock- erward seek to hold the corporation upon its primary the extent of the assets which may still be applica- payment of its debts. The corporation should be

brought in, so that the decree establishing the indebtedne
be binding in favor of the stockholders against the corpo
as well as against the stockholders in favor of the credit

If the court of Colorado has decided otherwise, its d
is not binding upon this court: Scott v. Neely, 140 U.
116, 16 Sup. Ct. Rep. 712, 35 L. ed. 358; Elkhart Nat
v. Northwestern Guaranty Loan Co., 87 Fed. 252, 30 C
632; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. Rep.
L. ed. 839. Its decision as to the meaning of the subs
provisions of the statute must be followed and we do
tempt to question it. But when the substantive provisi
made plain, the mode of procedure and practice in givi
remedies provided by the statute, depend upon the law
place where the remedy is sought. We cannot give ef
the provisions of this statute in Massachusetts if it ca
remedies which, according to our rules of practice, can
given for want of jurisdiction of the necessary parties.

Whether in proceedings instituted in Colorado, to wh
corporation is a party, creditors may have a remedy und
statute against nonresident stockholders upon whom no
is made, so far as to bind them upon the principles st
Howarth v. Lombard, 175 Mass. 570, 577, 56 N. E. 8
L. R. A. 301, by a decree establishing [40] everything th
be established in the home of the corporation, and thu
a foundation upon which to stand in a subsequent pro
where service can be made upon these stockholders, is
tion which we need not now decide: See Hancock Nat
v. Ellis, 172 Mass. 39, 45, 70 Am. St. Rep. 232, 51 N.
42 L. R. A. 396. Even if the remedy provided should
to be entirely ineffectual against nonresident stockhold
would not be a sufficient reason for our disregarding esta
principles and rules of practice.

The proceedings in the courts of Colorado, set out in t
have not determined enough to subject the defendant to a
in favor of the plaintiffs here. It appears that he was no
a party to the suit against stockholders there. Neit
corporation nor the assignee was a party. For these
nothing that was determined in that suit can affect the
ant. The proceedings in insolvency do not include that
establishes liability in this case.

The recent decisions in this court and elsewhere, by
the liability of stockholders in foreign corporations ha
enforced after a judgment obtained against the corpo

different grounds and need not be considered: Hanank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414, 49, 172 Mass. 39, 70 Am. St. Rep. 232, 51 N. E. R. A. 396; Howarth v. Lombard, 175 Mass. 570, 56 49 L. R. A. 301; Broadway Nat. Bank v. Baker, 94, 47 N. E. 603; Whitman v. Oxford Nat. Bank, 59, 20 Sup. Ct. Rep. 477, 44 L. ed. 587; Hancock v. Farnum, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 9.

firmed.

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atutory Liability of Stockholders may be enforced beyond the state, see Kulp v. Fleming, 65 Ohio St. 321, 87 Am. and cases cited in the cross-reference note thereto. As and character, the liability of a stockholder is to be the law of the state where the corporation exists and by was organized: Ball v. Anderson, 196 Pa. St. 86, 79 Am. and cases cited in the cross-reference note thereto; Man-Land etc. Co., 154 Ill. 177, 45 Am. St. Rep. 124. As to law of the forum governs the procedure in enforcing the Aldrich v. Anchor etc. Coal Co., 24 Or. 32, 41 Am. St. Rep. hic note to Fowler v. Lamson, 37 Am. St. Rep. 171. And essary parties to the action, see Bates v. Day, 198 Pa. St. St. Rep. 811; Zang v. Wyant, 25 Colo. 551, 71 Am. St. nographic note to Thompson v. Reno Sav. Bank, 3 Am.

CHERRY v. SPRAGUE.

[187 Mass. 113, 72 N. E. 456.]

S AND NOTES—Promissory Note Providing for Attor-nd Increased Rate of Interest After Default.—An instru-ing for the payment of a sum certain at a designated terest at six per cent per annum, and that unpaid inter-r interest at twelve per cent per annum, and if suit is that customary attorneys' fees shall be added to the d taxed as costs, is a promissory note. (p. 383.)

RACT, Place Where Deemed to have been Made.—A ote signed in Massachusetts, but payable in South Dakota, te it was sent to the payee by mail, is a South Dakota assachusetts contract. (p. 384.)

S AND NOTES.—A Third Person Placing His Name on a Promissory Note Before Delivery to the Payee is an misor or maker, not entitled to have demand or notice nt, and, as to him, no consideration need be proved. (p.

Action of contract on an instrument claimed to be a p
issory note indorsed by the defendant before delivery. A
trial, the plaintiff offered in evidence the alleged note and
a notary's certificate of protest showing that he made de
and protested the note August 19, 1895, and then mai
notice of protest to the defendant at Boston, Massachu
without designating any street or number. It was adm
that all the signatures to the instrument were placed th
in Massachusetts, and it was mailed in that state to the p
tiff in South Dakota. The note was made in renewal of a
existing note executed to the plaintiff by Odin Fritz
greater amount, but which by payments had been reduc
the amount for which the note involved in this suit was g

The defendant asked the court to rule (1) that the in
ment was not a promissory note; (2) that its validity w
be determined by the laws of Massachusetts; (3 and 4) tha
question of the effect of the defendant's indorsement was
determined by the laws of the last-named state, and that t
under he was not liable; (5) that it must appear that
was a consideration for the defendant's placing his name o
instrument; (6 and 7) that there was no evidence of
presentment or of due notice of nonpayment; and (8) tha
instrument became due August 16, 1895. The judge rule
cording to requests 6, 7 and 8, and further ruled as fol
(1) That the instrument was payable in South Dakota
governed by its laws; (2) that the law of South Dakota
presumed to be the same as the common law of Massachu
but there is no presumption that the statute law of the
states agree; (3) by the common law of Massachusett
defendants were joint makers of the note and not entitl
have a demand made and notice of nonpayment given t
(4) that if a demand and notice were necessary, it was not
sonably made. A verdict was ordered for the plaintif
three hundred dollars, and the defendant alleged exceptio

C. H. Sprague, pro se.

A. H. Read, W. J. Gaffney and C. A. Mendall, for the p
tiff.

116 BARKER, J. The instrument declared on as a pr
sory note is of the following tenor:

"$218.00. Sioux Falls S. D. April 15, 18

"Four months after date for value received I promise t
to the order of U. S. G. Cherry, Two Hundred and Eig

h interest at six per cent per annum, at the Union
ınk, Sioux Falls, South Dakota.
interest shall bear interest at twelve per cent, and if
nenced the customary attorney's fees shall be added
unt of the judgment and taxed up as part of the
cause.
g. 15, '95.
2. ODIN FRITZ.

nents: CHARLES H. SPRAGUE.
"C. EVERETT WASHBURN.
"U. S. G. CHERRY."

trument contains an unconditional promise to pay
rtain the definite sum of two hundred and eighteen
h interest at six per cent per annum from August
o the order of the plaintiff. If this were all it
course be a promissory note. But the additional
do not change the promise into a conditional one
ect, and they relate solely to the manner in which
itional promise to pay the definite sum may be en-
broken. This distinguishes the case from Haskell
, 16 Gray, 592, Costelo v. Crowell, 127 Mass. 293,
. 367, Sloan v. McCarty, 134 Mass. 245, and Moore
, 167 Mass. 74, 44 N. E. 1070. In each of those
dded stipulations made the contract conditional, or
one to pay an indefinite amount, or not to pay the
absolutely and at all events. It is settled that the
on into an instrument which contains an uncondi-
ise to pay a definite sum of money of additional
does not of itself necessarily deprive the instru-
e character of a promissory note. A recital that
al rate of interest will be paid after maturity and
ker has deposited certain collateral, and a statement
s upon which the collateral has been deposited, and
may be sold upon nonpayment of the note does not
effect: Towne v. Rice, 122 Mass. 67, 73, 75, and
. The test is that intimated [117] by Mr. Justice
oan v. McCarty, 134 Mass. 245. If the additional
relates to the manner in which the unconditional
pay a definite sum may be enforced, and does not
promise from one to pay that sum absolutely and
ts, or change the general nature of the whole con-
nstrument is a promissory note notwithstanding the

additional stipulations, relating to the manner of enforce
of the promise, if it shall be broken.

In the present instance, as the action is brought by the
inal promisee it is of no importance whether the instrume
negotiable or non-negotiable, and we do not consider or d
that question.

As the instrument was a promissory note and as it was
able in South Dakota and was sent to the payee by mail
received by him in that state it was a South Dakota and n
Massachusetts contract: Nashua Sav. Bank v. Sayles, 184 M
520, 522, 100 Am. St. Rep. 573, 69 N. E. 309, and cases ci
Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104
N. E. 345.

It is contended upon the plaintiff's brief that by the la
South Dakota the stipulation as to an attorney's fee was
and the instrument a negotiable promissory note; and fur
that under the statute of that state, the eighteenth da
August, 1895, being a Sunday, the note matured on Au
19, 1895, the day on which it was protested for nonpaym
The brief cites in support of these contentions the case
Chandler v. Kennedy, 8 S. Dak. 56, 65 N. W. 439, and Nati
Bank of Commerce v. Feeney, 9 S. Dak. 550, 70 N. W. 874
L. R. A. 732, and the Revised Civil Code of South Dakot
1903, section 2236. But the bill of exceptions upon which
case is here contains no statement of these citations nor of
evidence of the law of South Dakota, and it is apparent
the decision of the judge was made without taking into co
eration the cases and the statute mentioned, and that we
not consider them.

No proof as to the law of South Dakota having been offe
the judge was right in ruling that the common law of
state is to be presumed to be the same as that of this c
monwealth, and that there was no presumption that the st
tory law of the two states is the same: Kelley v. Kelley,
Mass. 111, 42 Am. St. Rep. 389, 36 N. E. 837, 25 L. R. A. 8
Olds v. City Trust etc. Co., 185 Mass. 500, 102 Am. St. R
356, 70 N. E. 1022.

Therefore, we are to determine whether the rulings of
court [118] below should be set aside as contrary to the com
law of this state. Examining them with this view, we ar
opinion that the defendant has no just ground of exceptio

His requests that there was no evidence of due presentm
or of due notice to the defendant of nonpayment, and that

became due on August 16, 1895, were given, and exception on those points. His contentions that the the instrument and the question whether he is eon are to be determined by Massachusetts statutes d of by the doctrine of Nashua Sav. Bank v. Sayles, 520, 69 N. E. 309. His other requests and his ex- their refusal and to the ruling that under the com- f this state the defendant was a joint maker of the ot entitled to demand and notice of nonpayment are f by our decisions, which show that by the law of aside from statutory enactments, a third person name on the back of a promissory note before deliv- payee is an original promisor or maker, not entitled mand or notice of nonpayment and that as to him ration need be proved: Sumner v. Gay, 4 Pick. 311; Woods, 127 Mass. 141; Spaulding v. Putnam, 128

e considerations which require the overruling of the dispose of the questions raised by the demurrer. ns overruled; order overruling demurrer affirmed.

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on in a Note for a specified additional rate of interest after oes not destroy its negotiability: Merrill v. Hurley, 6 S. 5 Am. St. Rep. 859. See, too, Clark v. Skeen, 61 Kan. 526, Rep. 337; Hope v. Barker, 112 Mo. 338, 34 Am. St. Rep, whether a stipulation for attorneys' fees affects the nego- a note, see Stadler v. First Nat. Bank, 22 Mont. 190, 74 p. 584, and cases cited in the cross-reference note thereto. *t of Writing One's Name on the Back of a Note* before de- scussed in the monographic note to Cadwallader v. Hirsh- n. St. Rep. 676-684; Camp v. First Nat. Bank, 44 Fla. 497, t. Rep. 173, and cases cited in the cross-reference note

ligned in Tennessee and forwarded to the payee in Ohio, terms payable in Ohio, is an Ohio contract: Bank v. Shaw, 237, 97 Am. St. Rep. 840. See, also, Swedish-American v. First Nat. Bank, 89 Minn. 98, 99 Am. St. Rep. 549; tes Sav. etc. Co. v. Beckley, 137 Ala. 119, 97 Am. St. Rep. thal v. Mascagni, 183 Mass. 19, 97 Am. St. Rep. 404.

FLEMING v. MORRISON.

[187 Mass. 120, 72 N. E. 499.]

WILLS, Contradicting Statements in, for the Purpose o validating.—It is competent by parol evidence to contradict s statements contained in an instrument that it is a will and has signed as such by the person named therein as testator and att and subscribed by the persons signing as witnesses. (p. 388.)

WILLS, Testator's Statement that the Instrument was n tended to Operate as Such.—Though an instrument purports to will and to be signed by the testator and attested and subscrib the necessary witnesses, it may be proved to be not of testame character by evidence that the testator told the witness before he first acknowledged it, before they parted, that the instrumen a fake will made for a purpose. (pp. 388, 389.)

WILLS, Acknowledgment of Before Some of the Witn When there was No Testamentary Intent.—If a testator first exe what purports to be a will before a witness and causes its subscri by him as such, and then tells him before they part that it is a will, to accomplish a purpose, but afterward changes his mind then, with testamentary intent, acknowledges it before and cau to be subscribed by two other witnesses, it cannot operate as a because it is necessary that a testamentary intent exist at the of acknowledging the will and having it subscribed by each o required witnesses. (p. 389.)

Application for the probate of an instrument as the last and testament of Francis M. Butterfield. Such instru was as follows:

"Be it remembered that I, Francis M. Butterfield, of I County of Essex of Massachusetts in the Commonweal Massachusetts, being of sound mind and memory, but kno the uncertainty of this life, do make this my last will testament, this 18th day of May, 1901.

"After the payment of my just debts and funeral ch I bequeath and devise as follows:

"To Mary Fleming of Lynn State of Massachusetts a My Possessions at My death of all Real est and personal erty and all that May Come to Me after My death.

"FRANCIS M. BUTTERFIEL

"I appoint Mary Fleming my Administratrix.

"In testimony whereof I hereunto set my hand and i presence of three witnesses declare this to be my last will 18th day of May 1901 day of 1901 in the year one thou and Nine hundred and one.

"On this 18th day of May day of May A. D. 1901 Lynn of Massachusetts Massachusetts, signed the foregoing in

ur presence, declaring it to be his last will: and as
hereof we three do now, at his request, in his pres-
in the presence of each other, hereto subscribe our

"SIDNEY S. GOODRIDGE.
"ERON J. BRYANT.
"ZELLA J. CHENEY."

J., before whom the application was heard, found as
find that on or about May 18. 1901, Francis M.
called upon Sidney S. Goodridge and requested him
his will, leaving all his property to the Mary Flem-
in the instrument admitted to probate as the will
utterfield. Thereupon said Goodridge drew up the
ment, said Butterfield signed it, and said Goodridge
d subscribed said instrument as a witness to the
f said Butterfield. Before Butterfield and Goodridge
tterfield told Goodridge that this was a 'fake' will,
purpose.
by the evidence in this case that said Butterfield
this that he did not intend to complete the instru-
ving it attested and subscribed by at least two other
and that the purpose referred to by him was to in-
Fleming to allow him, said Butterfield, to sleep with
rward said Butterfield determined to complete the
of his will, and for that purpose he produced the
before the other two attesting witnesses, Bryant and
ld them it was his will, that the signature was his
and asked them to attest and subscribe it as wit-
oodridge, Bryant and Cheney were all competent wit-

that the words appointing Mary Fleming as 'adminis-
ere written on the instrument after it was attested
ibed by Bryant and Cheney."
l was admitted to probate, but the case, at the re-
e contestants, was reported for determination by the

Murphy, H. T. Lummus and J. W. Berry, for the ap-

Harriman and J. F. Neal, for the appellants.

RING, J. All the rulings asked for at the hearing
waived, and the only contention now insisted upon

by the contestants is that on the finding made at the hea
the proponent of the will has failed to prove the necessary
mus testandi. We are of opinion that this contention
prevail.

The finding that before Butterfield and Goodridge "par
Butterfield told Goodridge that the instrument which had
signed by Butterfield as and for his last will and testament
declared by him to be such in the presence of Goodridge,
attested and subscribed by Goodridge as a witness, "was a
will, made for a purpose," is fatal to the proponent's case.
must be taken to mean that what had been done was a s
This is not cured by the further finding that what Butter
meant by this was "that he did not intend to complete th
strument by having it attested and subscribed by at least
other witnesses, and that the purpose referred to by him
to induce said Fleming to allow him, said Butterfield, to
with her."

This is not a finding that Butterfield intended to sign
instrument before Goodridge as and for his last will and t
ment, leaving the further execution to depend on future ev
Much less is it a finding that Butterfield changed his mind
he had signed and had had Goodridge attest and subscribe th
strument. The whole finding taken together amounts to a
ing that Butterfield had not intended the transaction which
just taken place to be in fact what it imported to be—th
to say, a finding that when Butterfield signed the instru
and asked Goodridge to attest and subscribe it as his wil
did not in fact then intend it to be his last will and testan
but intended to have Mary Fleming think that he had ma
will in her favor to induce her to let him sleep with her.

123 We are of opinion that it is competent to contradic
parol the solemn statements contained in an instrument
it is a will, that it has been signed as such by the person n
as the testator and attested and subscribed by persons sig
as witnesses: Lister v. Smith, 3 Swab. & T. 282; Nicho
Nichols, 2 Phill. 180; In the Goods of Nosworthy, 11
N. S., 570. For similar cases as to wills, see In the Goo
Hunt, L. R. 3 P. & D. 250, where it was held that it coul
shown by parol that the instrument executed was execute
mistake and Hubbard v. Alexander, 3 Ch. D. 738, whe
was held that one of two codicils duly executed was inte
to be a duplicate. It was lately held by this court that a
ten agreement, duly executed, could be shown to have been

a condition: Elastic Tip Co. v. Graham, 185 Mass. I. E. 117. And see the cases there cited.

nomentous consequences of permitting parol evidence utweigh the sanction of a solemn act are obvious. It dency to place all wills at the mercy of a parol story estator did not mean what he said," in the words of Sir lde, in Lister v. Smith, 3 Swab. & T. 282, 288. In learned judge went so far as to say that it was so a kind of evidence and that it was so difficult to im- a jury "the enormous weight which attaches to the itself as evidence of the animus with which it was at although he was prepared in that case to act on the f the jury, he was "far from saying that the court l cases repudiate a testamentary paper simply because be induced to find that it was not intended to oper- h."

not accede to the argument of the proponent that a e a deed where witnesses are required to the signature antor. In that case it is enough that the instrument te when delivered. But in case of a will there is no of the instrument. The punctum temporis in case is when it is signed, or, having been signed previously, signature is acknowledged in the presence of three witnesses. And where this is done before each witness y (as it may be done in this commonwealth, Chase v. , 11 Allen, 49, 87 Am. Dec. 687), the animus testandi st when it is signed or acknowledged before and at- d subscribed by each of the necessary three witnesses. s not done the statutory requirements have not been with.

suming that the acknowledgment animo testanti of re not originally made with that animus is enough, in the case at bar would have been duly executed had ld subsequently acknowledged the instrument before place of two additional witnesses. But he did not do instrument having been acknowledged and attested cribed by two witnesses only is not a valid will within Laws, chapter 135, section 1.

not been argued that the want of the necessary animus is not open under the terms of the first reason of ap- lthough the question here discussed was not raised at ng by the rulings requested by the contestants, it was d by the presiding justice and is presented by the rul-

ing made on his finding. The case does not come within
brook v. Young, 108 Mass. 83, relied on by the proponer

Decree to be entered reversing decree of probate court
disallowing the instrument as the will of Butterfield.

Declarations of the Testator to impeach a will are discussed
Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179; Robinson v.
ster, 140 Ill. 649, 33 Am. St. Rep. 265; Swope v. Donnelly, 190 P
417, 70 Am. St. Rep. 637; note to Roberts v. Trawick, 52 Am.
167-169.

HUTCHINSON v. NAY.

[187 Mass. 262, 72 N. E. 974.]

PARTNERSHIP, Goodwill of, Right of Administrator o ceased Partner in.—On the dissolution of a partnership by the of one of its members, the goodwill of the firm is part of its a which the administrator of the decedent has the right to have as such, but a sale thus forced on a surviving partner does not on the same footing as a voluntary sale by a sole trader of the will of his business. (p. 391.)

PARTNERSHIP, Goodwill of, Effect of Compulsory Sale Against Surviving Partner.—If a sale of the goodwill of a partne is forced upon the surviving partner by the administrator of ceased partner, the former is not bound to retire from, but may tinue in, business and solicit trade from customers of the old (p. 394.)

PARTNERSHIP, Voluntary Sale of Goodwill of by Surv Partner, Representatives of a Deceased Partner, When not En to an Accounting for.—If a surviving partner, for nearly two after the dissolution of the firm by the death of one of its mem continues business at the old stand, dealing with customers o old firm, there being but little change in the personnel of th tomers, and then voluntarily sells the goodwill of the business, a covenant to continue in the employ of the purchaser for six m and to do all in his power to hold the customers for the purc and not to engage for five years in the business conducted b old firm in the district covered thereby, the goodwill thus sold the goodwill of the old partnership, and the surviving partn under no obligation to account to the administrator of the dec for the proceeds. (p. 394.)

Bill filed July 17, 1903, by the administratrix of the of Joseph I. Hutchinson against the defendant, as surv partner of the firm consisting of himself and the comp ant's intestate, who died January 23, 1901, and for a counting of the sale and proceeds of the goodwill of the By the trial court the case was reserved for determinatio the full court.

Iale and E. P. Carr, for the plaintiff.

ay and R. E. Buffum, for the defendant.

RING, J. In the previous suit, Hutchinson v. Nay, 355, 67 N. E. 601, the plaintiff sought to charge the with the value of the goodwill of the former firm Nay and Company, which was dissolved by the death nson, on two grounds, namely, that the defendant, ing partner, had agreed with the administratrix of n's estate, the plaintiff, to buy the goodwill of the secondly, that he had appropriated it to himself and und to account for its value. The present bill is n the fact that while the first bill was pending the sold the goodwill for five thousand dollars.

inclined to think that the plaintiff is barred by the from raising the question which is the subject of the l: See Foye v. Patch, 132 Mass. 105. But the effect of goodwill which has been made by the defendant en in fact considered by the court, and as the plaintiff nion of the court is not entitled to maintain the pres- ven if the question is still open to her, we have more satisfactory to dispose of the case on the merits stion.

of opinion that on the dissolution of a firm caused by of one of the partners, the goodwill of the firm's a part of the assets of the partnership, and, in the an agreement between the partners dealing with the administrator of a deceased partner has a right to d as part of the assets of the firm. But we also are that a sale thus forced upon the surviving partner and on the same footing as a voluntary sale by a sole he goodwill of his business.

of goodwill is of recent growth. One hundred years the law of England that the goodwill of a partner- ved for the benefit of the living partner: Hammond v. Ves. 539. That is not so there to-day. To-day, on ry, in England on the death of a partner, the executor strator of the deceased partner can have the goodwill of the assets of the firm: Johnson v. Helleley, 2 De S. 446; Hall v. Barrows, 4 De Gex, J. & S. 150; In [1899] 1 Ch. 378, 382; Lindley on Partnership, 6th In the growth of the law of goodwill in England

an anomaly has crept in, which [264] has not obtained here is, that one who has voluntarily sold the goodwill of his ness can set up a competing business but cannot otherwis ogate from his grant. It is undoubted law in England to Trego v. Hunt, [1896] App. Cas. 7. It was held in Labou v. Dawson, L. R. 13 Eq. 322, that the result of working o conflicting rights of the vendor and the purchaser of the will of a business was this: The vendor can set up a com business but he cannot solicit business from customers o old firm. In Ginesi v. Cooper, 14 Ch. D. 596, Jessel, M felt the anomaly which was involved in a rule which s the vendor of his goodwill: You shall not derogate from grant and so are forbidden to solicit business from cust of the old firm, but you may deal with them if they volun come to you; and in Leggott v. Barrett, 15 Ch. D. 306, H joined such a vendor from dealing with the customers o old firm. This gave rise to a variety of opinions (see Pe v. Pearson, 27 Ch. D. 145), which were finally set at re the decision of the house of lords in Trego v. Hunt, [App. Cas. 7; and the line was finally drawn as it was d in Labouchere v. Dawson, L. R. 13 Eq. 322. But in deliv his opinion in Trego v. Hunt, [1896] App. Cas. 7, 19, Herschell said, speaking of the result in Labouchere v. Da "These circumstances appear to me to afford an indicatio the courts recognized that their view of what was mea 'goodwill' and the effect of a sale of it differed from the po conception. Where the goodwill of a business is not sold circumstances such as I have been discussing, but the s the voluntary act of the vendors, I am by no means sa that a different effect might not have been given to the sal the obligations which it imposed. It might have been that the vendor was not entitled to derogate from his gra seeking in any manner to withdraw from the purchaser th tomers of the old business, as he would do by setting business in such a place or under such circumstances t would immediately compete for the old customers. It is however, too late to make any such distinction. I thi must be treated as settled that whenever the goodwill of a ness is sold the vendor does not, by reason only of that come under a restriction not to carry on a competing busi To a similar [265] effect, see Lord Macnaghten in Trego v. [1893] App. Cas. 7, 23, 24; and Lord Davey, [1893] App 27, 29.

ord Herschell there suggests might have been held
d has been held to be the law in Massachusetts. In
etts the vendor of the goodwill of his business can-
a competing business at all, if by so doing he would
rom his grant: Webster v. Webster, 180 Mass. 310, 62
.

re a sale of partnership assets is forced upon the sur-
he administrator of a deceased partner, the surviving
not in the position of a sole trader who voluntarily
l with the goodwill of his business. He is not bound
rom business as a sole trader impliedly elects to do by
y selling his goodwill. A sale of goodwill forced
surviving partner is like the sale of the goodwill of a
r by his trustee or assignee in bankruptcy. In that
been held in England that the bankrupt cannot only
competing business (a thing which may be done in
where a sole trader voluntarily sells the goodwill of
ss, as has been shown), but he may solicit business
old customers, a thing which in England cannot be
se of a voluntary sale: Walker v. Mottram, 19 Ch. D.
o v. Hunt, [1896] App. Cas. 7, 19, 23. No injustice
the estate of a deceased partner by this rule. If the
s all that the creditors of a sole trader can get, full
done to it, while to put the surviving partner in the
ssumed by a sole trader who voluntarily has elected to
odwill would be an act of great injustice. The law
d in this connection seems to be otherwise. In Re
899] 1 Ch. 378, it was stated by Romer, J., in a case
re was an agreement for the sale of the goodwill on
of one partner, that independently of that agreement
al representative of the deceased partner had a right
he goodwill sold, and if sold, the sale would be con-
the basis on which the sale is conducted in case of
ry sale by a sole trader. And this had been assumed
law in the earlier cases of Johnson v. Helleley, 2 De
S. 446, and Hall v. Barrows, 4 De Gex, J. & S. 150,
ince been assumed to be the law in Dixon v. Dixon,
Ch. 161, and in Curl Brothers v. Webster, [1904] 1
But the [266] practical result of holding the surviving
o be in the position of a sole trader who voluntarily
yed the goodwill of his business is so different in Eng-
what it is here that the authority of these cases is not
weight in this commonwealth.

For these reasons we are of opinion that if a sale of the goodwill had been asked for and ordered in the case at l would have been directed to be conducted on the footing the surviving partner was at liberty to enter on a com business and to solicit trade from the customers of the old

Where, therefore, the defendant in the case at bar, year and eleven months after the death of Hutchinson, c on business at the old stand, with customers of the old there being only slight changes in the personnel of th tomers, and then sold the goodwill of his business, with a nant to continue in the employ of the purchaser for six m and to do all in his power to hold the customers for the chaser, and with another covenant not to engage in the te business for five years within the district covered by th business, the goodwill sold was not the goodwill of the old but the goodwill of the defendant, and there is no obli to account for even a nominal sum.

The entry must be bill dismissed with costs.

On the Goodwill of a Partnership and the means of making i ductive upon the death of a member or the dissolution of the see the monographic note to Slater v. Slater, 96 Am. St. Rep. 6

CODMAN v. BRIGHAM.

[187 Mass. 309, 72 N. E. 1008.]

TRUSTEES, When Created.—If property is by will trans to executors charged with a trust in its management and dispo they necessarily take title as trustees, though the word "trust not used. (p. 397.)

CHARITIES, Public, When and for What Time Crea Where property is devised to executors charged with a trust t and manage it for twenty-five years, and accumulate the incom then to dispose of the property and its accumulation for the p of founding a hospital, a trust for charitable uses is created, a instrument creates from the death of the testator a public ch (p. 397.)

PERPETUITIES.—A Forbidden Perpetuity is not C where property is devised and bequeathed for a public charity, t the trustees are required to hold the property and accumulate a for a period extending beyond the time prescribed in the rule a perpetuities. (pp. 397, 398.)

CY PRES.—If property is devised and bequeathed to tr to be held and accumulated for twenty-five years, after which poration is to be formed to which the property and accumulatio

ferred to be used for a specified public charity, such cor-
simply part of the machinery to be provided for the
ution of the charitable purpose, and if for any reason it
impossible to establish the corporation, the agreement
fail, but the court would apply the doctrine of cy pres
e some other method of administering the charity. (p.

the trustees under the will of Peter Bent Brigham
ctions. Lathrop, J., before whom the case was heard,
t for the determination of the full court.

horndike, for the trustees.

now, for the heirs at law.

abney, for the Peter Bent Brigham Hospital.

OWLTON, C. J. This is a bill brought by the trus-
nted under the will of Peter B. Brigham, for instruc-
egard to the disposition of certain income in their
eived under the fourteenth clause of the will. This
as follows: "All the rest and residue of my property
, of every kind and description, real, personal and
which I shall die seised or possessed, or to which I
ntitled at the time of my decease, I direct my said
to take, hold, manage and invest, for the term of
e years from the time of my decease, and to take the
erest, income and profits thereof and from the net
ereof to appropriate and pay as follows, that is to say."
ow seven provisions for the payment of annuities to
and friends of the testator, with directions on the
he annuitants to pay specific sums to their children
e leaving children, concluding as follows: "My said
shall add the balance [311] of said net income, that
in after making the payments aforesaid, to the prin-
y said estate, so that the same may be accumulating
erm of twenty-five years aforesaid; and at the ex-
f said term of twenty-five years from my decease, my
tors shall set aside a sum or sums of money and may
e same in some safe trust company—preference being
er things being equal, to the Massachusetts Hospital
rance Company, of said Boston—which shall be suffi-
rovide for the payment of such of the foregoing lega-
equests, if any, as shall then be unfulfilled; or may
r the payment of such unpaid legacies and bequests by
ase of annuities for the unpaid legatees or otherwise,

as my said executors shall deem expedient; and after th
ment, or provision for the payment, as aforesaid of a
foregoing bequests and legacies, the unexpended balanc
any, shall be paid to and for the use of the hospital herei
provided for."

Then comes the following paragraph: "8. At the expi
of said term of twenty-five years from the time of my d
my said executors shall dispose of said rest and residue
property and estate and of all the interest and accumul
which shall have accrued thereon, for the purpose of foun
hospital in said Boston, to be called the Brigham Hospit
the care of sick persons, in indigent circumstances, residi
the said county of Suffolk, in the following manner—t
to say: They shall procure the formation of a corporation,
called the 'Brigham Hospital' with suitable provisions as t
cers, their powers and duties for control, direction, conduc
administration of the corporation and the care and manag
of the funds in its charge; and upon the legal formatio
organization of said corporation, my said executors shall
fer to it all the property and estate provided for it as afo
to be by it used and employed for the purposes above declar
and I give, devise and bequeath said rest and residue
property and estate accordingly."

The testator died on May 24, 1877, leaving real estat
ued at six hundred and ninety thousand dollars, and pe
estate which amounted to about three hundred and twen
thousand dollars, after payment of debts and the legacies
than those payable under the fourteenth clause. The exe
qualified, [312] and managed the property until the death
last survivor of them, when the plaintiffs were appointed
tees by the probate court, and, thus succeeding to the
of their predecessors, they since have continued the exe
of their trust. The corporation was formed under the g
laws in May, 1902, and because such a corporation coul
hold property in excess of one million five hundred tho
dollars, the Statutes of 1902, chapter 418, was passed on
22d of that year, which authorized the corporation to hol
and personal estate to an amount not exceeding five m
dollars. On May 24, 1902, four million three hundre
eleven thousand nine hundred and thirty-five dollars and
five cents was paid to the corporation by the trustees.
whole property in the hands of the corporation, with that
by the trustees to meet the remaining payments called for

provisions of the fourteenth clause, amounts now to
five million dollars.

stly is contended by the heirs at law of the testator,
gift for the purpose of founding a hospital is void
rule against perpetuities. It therefore becomes neces-
scertain the meaning and construction of the will.
e begins with instructions to the executors in regard
ssession, management and disposition of the residue
ate, and, after proceeding at length with these direc-
nds with the words, "and I give, devise and bequeath
and residue of my property and estate accordingly."
ctions involve a final disposition of the whole of the
d the closing words expressly devise and bequeath it.
language, considered together, transfers the title of
operty to the executors, charged with a trust in re-
e management and disposition of it. This involves
mance of duties beyond those which belong to execu-
they necessarily take as trustees, although the word
is not used: Carson v. Carson, 6 Allen, 397; Bean
nwealth, 186 Mass. 348, 71 N. E. 784; Fay v. Taft,
448; Sears v. Russell, 8 Gray, 86, 89; Mullanny v.
2 Ill. 247, 72 N. E. 385. The trust is for charitable
he instrument creates, from the death of the testator,
charity. The beneficiaries who are entitled to the
interest are sick persons in indigent circumstances,
the county of Suffolk, for whose care a hospital is
lished: Burbank v. Burbank, 152 Mass. 254, 25 N. E.
R. A. 748. This charitable trust comes into exist-
mmediately on the probate of the will, and it com-
the rest and residue of the estate, except so much
d to make the payments called for in the seven pro-
ve referred to. Not only the legal but the equitable
s immediately, the legal estate in the trustees, and the
in that part of the public which is to be benefited.
s is required to pay the annuities and the sums which
o the surviving children of annuitants is held under
rust, and this amount, whatever it may prove to be,
to that extent the amount which otherwise would
iated to charitable uses.

ovided that the fund shall be held and accumulated
-five years before it shall be put to active use for the
e suffering. Such a provision is not uncommon, and
gh the time for the accumulation may extend beyond

the time prescribed in the rule against perpetuities, it i
invalid: Odell v. Odell, 10 Allen, 1; St. Paul's Church v
torney General, 164 Mass. 188, 203, 41 N. E. 231; Ou
Washington Hospital for Foundlings, 95 U. S. 303, 24 L
450; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. Rep. 32
L. ed. 397.

These and the other provisions, in regard to the manage
of the property, the payments from the income of the sum
the annuitants, the establishment of a corporation, and
transfer of the property to the corporation, are all mere d
of administration which the testator saw fit to prescribe
which do not affect the general character of the charitable
or the nature of the title created by the clause in que
Nothing passes directly to the corporation under the will
takes through a conveyance from the trustees, made in
execution of their trust: Ould v. Washington Hospita
Foundlings, 95 U. S. 303, 312, 24 L. ed. 450; Jones v. H
sham, 107 U. S. 174, 2 Sup. Ct. Rep. 336, 27 L. ed. 401; C
v. Williams, 145 Ill. 625, 648, 34 N. E. 467, 21 L. R. A.
The corporation is simply a part of the machinery to be
vided by the trustees, the better to execute the charitable
pose of the testator. If for any reason it should be impo
to establish such a corporation, the gift would not fail
the court would apply the doctrine of cy pres, and provide
other method of administering the charity to accomplish
stantially the same result: Darcy v. Kelley, 153 Mass.
437, 26 N. E. 1110; Weeks v. Hobson, 150 Mass. 377, 23
215, 6 L. R. A. 147; Amory v. Attorney General, 179
89, 60 N. E. 391, and cases above cited.

314 When the corporation is established with power to
the property, the trustees make a conveyance which tra
the legal title to the new party, which takes and holds it
the same charitable trust. The substance of the charity
gift of property to be held and used for the care of sick
sons in indigent circumstances in a hospital. That the ho
is to be established and maintained by a corporation,
than by personal trustees, is not of the essence of the
Sears v. Chapman, 158 Mass. 400, 35 Am. St. Rep. 50
N. E. 604. All of these details as to management are
regarded and put in execution so far as practicable. But
a gift is not allowed to fail if it becomes impossible to
in exactly the mode prescribed.

ntention that the gift is directly to the corporation, on preceding bequests to individuals, and that it may ffect until more than twenty-one years after the ex- f a life or lives in being, is therefore not well founded, ame is true of the argument that the gift to the contingent.

ome and accumulations of the property go with the the fund, so far as the title is concerned: Tainter v. Allen, 66, 69; Wharton v. Masterman, [1895] App. 192, 198. The legal title to the property having the trustees the title to its earnings was in them also. to have the earnings, when they should accrue, vested the charity on the death of the testator. Any other would render provisions for accumulation ineffectual: v. Odell, 10 Allen, 1, and cases there cited. The s in the opinions in Hale v. Hobson, 167 Mass. 397, 913, and Cronan v. Adams, 185 Mass. 436, 70 N. E. l on by the heirs at law, do not mean that the owner ipal fund, on which income subsequently accrues, has ted right to the income from the beginning. They ean that the income, as income, is not vested in pos- til it comes into existence: See, also, Safe Deposit & v. Wood, 201 Pa. St. 420, 427, 50 Atl. 920; Rhode spital Trust Co. v. Noyes, 26 R. I. 323, 58 Atl. 999. ne in this case, subject to the payments to be made nder the seven provisions, was all the time held for uses, as the principal was.

w which we have taken of the meaning of the clause estion makes it unnecessary to consider many of the elaborately argued by the counsel for the heirs. estions grow out of an entirely different construction guage of the will.

ision of the circuit court of the United States in an- brought by one of the heirs, and raising the same which are before us, is in accordance with the view have taken: Brigham v. Peter Bent Hospital, 126 This decision was affirmed by the circuit court of n an opinion (December 7, 1904) which appears in 513.

intiffs are instructed to pay to the Peter Bent Brig- pital the income and interest which they held at the ringing the suit.

ered.

The Rule Against Perpetuities is generally held inapplicable to for charitable uses: Mills v. Davidson, 54 N. J. Eq. 659, 55 A Rep. 594; Lane v. Eaton, 69 Minn. 141, 65 Am. St. Rep. 559; graphic note to In re Walkerly, 49 Am. St. Rep. 127-129. Co Missionary Society v. Humphreys, 91 Md. 131, 80 Am. St. Rep.

On What are Charitable Uses or trusts, see the monographic n Hoeffer v. Clogan, 63 Am. St. Rep. 248-267.

LIVINGSTONE v. MURPHY.

[187 Mass. 315, 72 N. E. 1012.]

AN EXECUTION SALE to a Wife Under a Judgment A Her Husband and a conveyance made pursuant thereto are void 402.)

MISTAKE OF FACT, What is.—A mistake as to the o ship of a lot of land is a mistake of fact. (p. 402.)

MISTAKE OF FACT—Relief in Equity.—An erroneous vi the legal effect of a deed in a chain of title is a mistake of against which equity will grant relief. (p. 402.)

STATUTE OF FRAUDS, Waiver of.—Where the statu frauds is not pleaded and does not appear to have been relied the trial, it must be regarded as having been waived. (p. 403.

LACHES in Seeking Relief from a Mistake of Fact.—A tiff is not chargeable with laches if he moves within a reasonable after discovering a mistake of fact to seek relief therefrom. (p.

EQUITY—Reformation of Mortgage.—If a Husband and to secure their joint note, execute a mortgage which was intend include all their title to certain lands, but, laboring under the taken belief that she owned such land, he joins in the mortgage so far as to release his estate as tenant by the curtesy, where fact, he owned part of the land in fee simple, equity, at the ins of the mortgagee, will compel them to execute a new mortgage veying the entire title of both, and such mortgage, when exec will be good against all persons who acquired any title or lien the execution of the imperfect mortgage and with notice of it firmity. (p. 403.)

NOTICE.—A Mortgage Which has been Satisfied and which no one claims title does not amount to notice to third sons of any of the recitals therein contained. (p. 404.)

NOTICE OF CONTRACT to Join in a Mortgage, When no ferable.—Where a mortgage is executed by a wife, and her hus joins therein to release his right of curtesy, and the note secur in fact signed by both, but is in the mortgage stated to be signe him only, and her claim of title to a part of the property is, a records show, based upon a void execution sale against him, and pears that both he and she and the mortgagee acted as though property was hers, these facts are not sufficient to give noti third persons that the husband had agreed to join in the mort Hence, the mortgage will not be reformed in equity, nor the e tion of a new mortgage compelled, so as to affect the rights of sons claiming under the husband, acquired after the execution o

ortgage and without actual notice that he had agreed to (pp. 404, 405.)

SULTING TRUST is not Created in Favor of a Wife by of a claim of one of her husband's creditors by means **ase of her husband's property at an execution sale against** 5.)

GAGE, Right of Subsequent Mortgagee to Contest.—The mortgage is excepted from the covenants contained in a ortgage, there being no agreement to assume it, does not sequent mortgagee from contesting its validity. (p. 405.)

XECUTION SALE is not Subject to Equities of which or judgment creditors had no notice. (p. 405.)

HASER With Notice from a Purchaser Without Notice.— property free from certain equities, because he acquired notice of them, a purchaser from him, though with no- l the title which such original purchaser had. (p. 406.)

ITCLAIM DEED Conveys All Title of the Grantor Free ities Against Him if the grantee is a purchaser for val- **eration, without notice.** (p. 406.)

OR AND PURCHASER—Bona Fide Purchaser—Burden of re real property sold for a valuable consideration and a quitclaim is subject to certain equities, the burden of ce of them must be assumed by the person seeking to (p. 406.)

wes, Jr., and C. E. Burke, for the plaintiff.

ore, for the defendants Murphy.

e, for the defendant Wood.

IMOND, J. This is a bill to reform a mortgage le its allegations, especially with reference to the d nature of the agreement under which the mort- ven, are somewhat defective and might perhaps be ient as against a special demurrer, still, in the ab- ch a demurrer, the bill may be construed as setting tance that there was an agreement between the the one hand, and the mortgagor, Margaret J. d her husband, James H. Murphy, on the other, ortgage should cover the entire interest both of the d wife in all of the land therein described; that by mutual mistake as to the ownership of the north- the land, the title to which part was in the hus- ot in the wife, the mortgage does not in fact cover nd therefore it is not in accordance with the agree- prayer of the bill is in substance that the mort- ormed, and that to that end James H. Murphy be execute and deliver to the plaintiff a mortgage con-

veying his right in all the land, to take effect as of the
of the date of the plaintiff's mortgage.

The bill with its amendments sets out the names of va
parties who, since the mortgage to the plaintiff, have, eith
attaching creditors, mortgagees or grantees, become inte
in the land, and they are all made defendants. At the
however, [317] the only defendants represented were th
Murphys and Wood, who was the holder of a prior mor
discharged when a mortgage to the plaintiff was made
also holder of a mortgage subsequent to that of the pla
The bill has since been taken for confessed against al
others.

The defendant James H. Murphy urges that, even if
was a contract, he was not a party to it. It appears, hov
that, although the mortgage describes the mortgage no
"signed by the said Margaret J. Murphy," it was in fact s
by her and her husband jointly, and hence his liability o
debt was the same as that of his wife. It further appear
it was the understanding of all parties that the mor
should cover his interest in the whole land and that in p
ance thereof he signed it to release his right of curtesy
was supposed at that time to be all the interest he had.
judge further finds that he then was ready and willing a
implication agreed to do whatever might be necessary to
a valid first mortgage upon the whole land. Under thes
cumstances he must be regarded as a party to the contra
far at least as concerns his interest in the land.

The mistake was as to the title to the northerly lot.
supposed that the wife owned it, whereas it was in fact
by the husband. She had received in 1893 a deed of it
a deputy sheriff made in pursuance of an execution sale a
her husband. This deed was supposed by all parties
valid and to work a change in the title from James to
garet, but it was in fact of no legal effect whatever: Stet
O'Sullivan, 8 Allen, 321. The mistake was mutual, a
was one of fact, namely, as to the ownership of the nor
lot. "Private right of ownership is a matter of fact; i
be the result also of matter of law; but if parties contract
a mutual mistake and misapprehension as to their relativ
respective rights, the result is, that that agreement is lia
be set aside as having proceeded upon a common mist
Lord Westbury, in Cooper v. Phibbs, L. R. 2 H. L. 149
And this is so, although the mistake arises from an erro

e legal effect of a deed in the chain of title. Against stake equity will relieve: Cooper v. Phibbs, L. R. 2), 170; Baker v. Massey, 50 Iowa, 399; Griffith v. 69 Mo. 13, 33 Am. Rep. 476; Pomeroy's Equity Ju- e, [318] sec. 849, and cases cited. See, also, Canedy 13 Gray, 373, 377.

endant Wood contends that the agreement was within e of frauds. But the statute was not pleaded, nor pear to have been relied upon at the trial. Under ar rule, that ground of defense must therefore be as having been waived. Nor do we think that the s chargeable with laches. She seems to have moved reasonable time after she became aware of the mis- edy v. Marcy, 13 Gray, 373, 377.

ge of the superior court, therefore, rightly ruled upon found that as against the mortgagor and her husband tiff immediately upon the execution of the mortgage an equity to compel them to execute a new mortgage uld be a first lien upon the northerly and southerly d this equity would prevail against all parties who tly took with notice.

in question is whether there was enough upon the give to attaching creditors and purchasers notice of able right of the plaintiff, or at least to put them on uiry. It will be observed that this was a right to defendant James H. Murphy convey to her the title the time of her mortgage he had in the northerly lot. this right it is not enough to show the mutual mis- ownership of the lot. It must further appear that an agreement on the part of James to convey his n it. Strictly speaking, the bill requests not a re- of the terms of the mortgage actually given, but v person shall be made a grantor. It seeks to compel execute a new mortgage, and it cannot be maintained m unless he originally agreed in substance to convey st. In a word, the two essential facts upon which able right of the plaintiff rests are, first, the mutual and second, the agreement of James to convey all his n the land.

his view of the plaintiff's case we proceed to examine ds. Margaret's title to the northerly lot rests upon of deputy sheriff Wood (not the defendant Wood) to l November 7, 1893. The deed recites that the con-

sideration, seven hundred and forty-five dollars, was pai
her, and it purports to convey to [319] her the interest o
husband James in the northerly lot. The next conveyan
the mortgage given by Margaret to the defendant Woo
February 22, 1894. She is the sole grantor named at th
ginning of the mortgage, but after the condition the hus
substantially joins therein; and there is a statement a
end of the description that the land is the same convey
Margaret by the above-mentioned deed of the deputy sh
Of this mortgage and its recitals the defendant Wood of c
had actual notice, because he was the mortgagee, but inasm
as it had been discharged and no one claims under it the r
is not constructive notice to the other defendants of th
citals therein contained. Next comes the plaintiff's mort
Margaret is the sole grantor, while James just before the in
timonium clause releases all right of curtesy. Althoug
above stated, the mortgage note was actually signed bot
Margaret and James, still that fact does not appear in
mortgage. On the contrary the note is therein describe
signed by "the said Margaret J. Murphy." Up to this
the record only shows at the most that Margaret received
the deputy sheriff a deed of the lot in question, for which
seems to have paid a valuable consideration; that from
time to the time of the plaintiff's mortgage both Margaret
James acted as if the title to that lot was in Margaret, and
the plaintiff, in taking her mortgage, seems to have acted
the same view. But that is not enough to put attaching
itors and subsequent purchasers upon their inquiry. Th
not the case where the record by fair implication refers t
unrecorded deed, as in cases like George v. Kent, 7 Allen
nor where one of the parties is declared to be acting in a r
sentative capacity, as in cases like Hayward v. Cain, 110 1
273. The plaintiff's mortgage proceeded upon the theory
Margaret owned the lot in her own right. So far as sh
by the record, the loan was made to and the note was si
by Margaret alone. The most natural inference would be
the only parties to the contract for the loan were Mar
and the plaintiff, and that the plaintiff was content to
upon Margaret's title for security: that, neither as a par
the contract nor as the owner of the fee, was James conce
in the transaction, and that the only thing he was expect
do was to release the curtesy. There is nothing [320] on r
to show that he acted even as the agent of Margaret, or

ı any way concerned in the transaction except to do
lid, namely, release his curtesy. It is going too far
ıt the simple fact that a husband releases his curtesy
ıd described in a mortgage by his wife purporting to
e land as hers is notice that he has agreed to convey
ıterest in the fee if it should turn out that he and not
owner. No notice, therefore, of the essential facts
by the record, nor was there enough to put a person
y.

ged by the plaintiff that the recital in the deed from
y sheriff to Margaret that the consideration was paid
ives notice of a resulting trust within the doctrine
l in Hayward v. Cain, 110 Mass. 273. But that doc-
pplicable only where the legal title is conveyed by the
ıe equitable title is attached to such legal title, and
deed is void of course the doctrine is not applicable.
simply paid a claim of one of her husband's creditors
did not give her a resulting trust in the land.

there anything in either of the two subsequent mort-
the defendant Wood to show that the plaintiff's mort-
not exactly what she was entitled to have under her
While it is true that the plaintiff's mortgage is ex-
ɔm the covenants contained in each of these two mort-
ll there is no agreement on the part of Wood to as-
and there is nothing to estop him from contesting its
s against the holder of it: Weed Sewing-Machine Co.
ɔn, 115 Mass. 554.

not understand that the plaintiff now contends that
ıment of release executed by the defendant Wood of
of June 16, 1898, had any other legal effect than sim-
scharge the mortgage given to him as above stated on
22, 1894.

ws from what has been said that the plaintiff's equity
revail except as against persons who took their title
ce other than that contained in the record. Applying
ciple to the facts, it is clear that it cannot prevail as
he two mortgages held by Wood. Nor can it prevail
execution sale to the Third National Bank, since it is
roved that either the attaching creditor, White, or the
l notice. Although Wood had notice when he pur-
om the bank, still he took the title the bank had. As
other defendants who have not seen fit to contest ex-
frew, we think that the plaintiff's equity should pre-

vail. So far as respects the deed to Renfrew, we hav
some difficulty as to the true effect of the report. The
seems to have been given after "it was whispered in Pit
that there was a flaw in the plaintiff's title." No copy o
before us. It was given by James H. Murphy, but it do
appear whether there was any release of dower by his wif
was a quitclaim deed. No finding is made as to whether
frew had notice of the plaintiff's equitable right.

A deed under seal, however, imports a consideration,
quitclaim deed in the ordinary form would have been suf
to convey the title to Renfrew free from the equitable ri
the plaintiff if he was a purchaser for valuable conside
without notice (Rev. Laws, c. 127, sec. 2), and the burd
proving notice is upon the plaintiff. Although the defe
Wood had notice when he bought from Renfrew, still, as
case of his purchase from the bank, he would take the
his grantor had. The bill was not taken pro confesso a
Renfrew until long after the deed from him to Wood, a
any event Wood's rights are not affected by this order.

After the original hearing, and after the judge had f
memorandum of his findings, the plaintiff moved to amen
bill by adding the following: "In the event of the court fi
that the plaintiff is not entitled to have her said mortga
formed as against the owners of the said Wood mortgage
of the title under the said execution sale, the plaintiff
to pay such amount as is found due for redemption. An
plaintiff prays that in such case the court will determin
amount due for redemption from said mortgages and sai
cution sale and that the plaintiff be allowed to redee
paying such amount." The proposed amendment was op
by Wood and was disallowed by the judge upon the g
that under the facts found by the court the "plaintiff h
right of redemption which extends or applies to the nor
lot." The judge then ordered that the bill be dismissed
by consent of parties [322] reported the case for deter
tion by this court upon certain reservations, the first of
was that "if upon the . . . . facts" reported by the judge
order dismissing the bill was right, and if upon those fac
plaintiff is not entitled to redeem, the order is to be affi
and a decree prepared and entered dismissing the bill."

In view of the state of the record with reference to the
frew deed, we think that the order dismissing the bil
right, because all the title of James H. Murphy in the

s to have passed to Renfrew free from the plaintiff's right, and hence a conveyance from James to the would be of no avail. And for the same reason she titled to a decree allowing her to redeem.

may be remarked that there was no need of the pro-endment. All the parties were before the court, and nts, both as to priority of title and of redemption, e been settled by the decree upon the bill as it now The fact that more than a year has expired since the sale is of no consequence since the bill was brought e year.

ult is that upon the report as it stands the bill should sed. But inasmuch as there is quite a large interest perty to which but for the deed to Renfrew the equi-t of the plaintiff would attach, and there has been no ding as to whether he did have notice in fact or was a for value, we are disposed, in view of the manifest the plaintiff's case, to allow the plaintiff to make an n to the trial court to have the case reopened and the nended so as to contain a finding upon these points. ch an application be made and allowed within sixty bill is to be dismissed. If the report be so amended e is to be a further hearing, if necessary, upon the re-mended, such hearing to be only upon the question fect of the deed to Renfrew upon the rights of the

ered.

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l Mistake as to the legal effect of an instrument, by the ereto, may constitute ground for a reformation in equity: randt v. Hofler, 117 Iowa, 103, 94 Am. St. Rep. 289; mono-te to Williams v. Hamilton, 65 Am. St. Rep. 488. See this pplied to conveyances in Whitmore v. Hay, 85 Wis. 240, 39 p. 838; Haussman v. Burnham, 59 Conn. 117, 21 Am. St. Rep. tgage executed by a husband and wife may be reformed so as real property omitted therefrom by mistake: Herring v. la. 54, 99 Am. St. Rep. 108.

n Deeds are discussed at length in the monographic note v. Wells, post, p. 849.

BACHANT v. BOSTON AND MAINE RAILROA

[187 Mass. 392, 73 N. E. 642.]

CARRIERS—Termination of Carriage.—If a carrier has n vided a freight-house for the storage of merchandise and expec signees to unload their goods directly from its cars, the transpo of grain cannot be considered as ended or the carrier release the consignee has been notified and the car placed where it conveniently unloaded. (p. 409.)

CARRIERS, Right to Rely upon Employé's Assurance Place is Safe.—Where one going to a railway station with a for grain is by the agent shown to a car and told to back up and that it was all right, he is justified in relying on this statem an assurance that the place where the grain is to be unloaded i (pp. 409, 410.)

CARRIERS, Delivery, Duty to Supply Safe Place.—A co carrier is required to provide a safe and proper place for t livery of goods which have been shipped by it. (p. 410.)

CARRIERS, Right of Persons Unloading Freight.—One u ing freight from a car of a railway at a point where it has placed for that purpose by the carrier has the right to assum while thus engaged he will not be subjected to injury in per property by the negligence of the carrier or of its agents. (p.

CARRIERS, Negligence of, What Constitutes.—To place at a point to be there unloaded and then to run its locomotive to come into collision with a team engaged in such unloading dence of negligence on the part of the carrier in the manag of its business. (pp. 410, 411.)

CARRIERS—Risk of Injury, When not Assumed by Pers loading Car.—If a person having grain to unload from a railway ca permission to do so, he does not assume all risks incident to the tion, where the car had by the carrier been placed in the p where it was for the purpose of being there unloaded, and the if delivered at all, must be taken out where the car had been by the carrier, and it appears that the person thus unloading d know there was danger from collision from passing trains. (p

EVIDENCE, Declarations, When not Part of the Res Ge Whatever is said by an agent of the carrier, after an accide lating to the use of a spur track as a delivery track is a sta not made in the performance of a duty and cannot bind his pri as an admission of liability. (p. 411.)

CARRIERS, Evidence of Custom as to the Place of Unl Freight.—Where an accident has occurred from a collision of way train with a wagon being used to unload freight from a ca dence that the place where such car was is the place where oth signees of freight or their servants were told by the station ag go into or use for the purpose of unloading goods is admissibl 412.)

CARRIERS.—An Instruction Given by a Station Agent Railway to Consignees or their servants as to the place to go i use for the purpose of unloading goods from cars is within the of his employment and binds his principal. (p. 412.)

of tort for injury to the plaintiff's team. Verdict
efendant, and the plaintiff alleged exceptions.

Saunders, for the plaintiff.

Thayer and A. H. Bullock, for the defendant.

ALEY, J. This is an action of tort to recover for
o the plaintiff's harnesses, horses and wagon, alleged
een caused by the defendant's negligence while un-
rain from a car at its station in the town of Weston.
fendant had not provided a freight-house for the stor-
erchandise, and apparently consignees were expected,
ng notice that consignments were ready for delivery,
their goods directly from the cars.
rdance with this system of dealing, the transportation
in could not be considered as ended or the carrier re-
delivery until the consignees had been notified and
aced where it could be unloaded conveniently by them:
. Boston etc. R. R. Co., 10 Met. 472, 477, 43 Am.
Norway Plains Co. v. Boston etc. R. R. Co., 1 Gray,
272, 61 Am. Dec. 423; Kimball v. Western R. R. Co.,
42, 544; Rice v. Boston etc. R. R. Co., 98 Mass. 212;
art, 118 Mass. 201, 208, 19 Am. Rep. 432; Indepen-
ls Co. v. Burlington etc. Ry. Co., 72 Iowa, 535, 2 Am.
258, 34 N. W. 320.
location and arrangement of the defendant's tracks,
s the car had been run upon a spur track so located
uld be reached and unloaded only from one side. To
car it was necessary to back a team into a triangular
ween this spur track and a sidetrack, which connected
nd with the main track, and was used to enable trains
t the station to pass each other. This space was
the testimony to be from ten to thirteen feet wide
d near the highway, and gradually narrowing until
a point where the spur track joined the sidetrack.
aintiff, who was under a contract with the consignees
the grain, sent his servant Coté with a team and the
ll to the station. Upon delivery of the freight bill
tion agent, one Cole, who for this purpose represented
dant, Coté testified that this conversation took place:
ed me a car and told me to back up there; it was
In connection with the duty imposed on the defend-
was justified in relying upon this statement as an as-

surance that the place where the grain was to be unloade
safe.

Two loads were taken out the first day without acciden
on the morning of the second day, when for the purp
getting the third load the wagon and horses were plac
tween the tracks with the wagon close to the side of th
and opposite the door, they were struck and damaged b
of the locomotives of the defendant that was passing ove
sidetrack.

On this evidence the jury could have found that they
there properly with the knowledge and direction of th
fendant's agent, and that in backing up to the car in the
ner described, as safe a position was taken as any that
have been occupied at the time of the accident.

It could have been found further that the car while
unloaded was in such a place that the team would be lik
be struck by passing trains, and that a proper place fo
delivery of the grain had not been provided.

Under its contract as a common carrier the defendan
*395 required to provide a safe and proper place for deli
Jewell v. Grand Trunk Ry. Co., 55 N. H. 84, 91; Indepen
Mills Co. v. Burlington etc. Ry. Co., 72 Iowa, 535, 2 An
Rep. 258, 34 N. W. 320; Anchor Mill Co. v. Burlingto
Ry. Co., 102 Iowa, 262, 71 N. W. 255.

The plaintiff or his servant, while unloading, was not o
to be in a state of continual apprehension that locomotiv
cars might run over the sidetrack and come into collision
the team, nor was he required constantly to observe the tra
avoid such a collision. He had the right to assume that
thus engaged, at a place designated by the defendant, he
not be subjected to injury in person or property by its
gence: Pratt v. New York etc. R. R. Co., 187 Mass. 5, 72
328.

Neither the consignees nor those lawfully acting for
were obliged thus to take the chance of injury, and they
entitled while at work in the place prescribed by the defe
to be free from the danger of being run down by trains
control: Sweeny v. Old Colony etc. R. R. Co., 10 Allen,
372, 87 Am. Dec. 644; Hathaway v. New York etc. R. R.
182 Mass. 286, 65 N. E. 387, and cases cited.

To place the car, and then to run its locomotive so th
came into collision with the team, was evidence of negli
in the management of its business at the station. Both

reach of duty toward the plaintiff on the part of the
Hathaway v. New York etc. R. R. Co., 182 Mass.
E. 387.

trial the jury were instructed that if the plaintiff's
d obtained permission from the station agent to un-
rain, he thereafter assumed any risk incident to the
and the plaintiff could not recover.

case before us is not parallel with Miner v. Con-
iver R. R. Co., 153 Mass. 398, 26 N. E. 994, where
e of volenti non fit injuria was applied. There was
n that case not only showing knowledge on the part
son in charge of the plaintiff's house of the danger
nto the freight-yard, but that fully appreciating the
voluntarily entered the yard, and that upon request
ave had the car moved to another and suitable place
ng unloaded. Here the grain, if delivered at all,
ken out [396] where the car was placed by the defend-
also appears that if Coté's evidence was believed he
ow there was danger from collision with trains pass-
he sidetrack.

his erroneous view of the law was stated in the first
instructions no exception appears to have been taken.
ater portion of the charge, to which the plaintiff did
same doctrine was repeated in these words: "Cole
me up there in the ordinary way and asked for the
ill and the number of the car was given him and
ng bill was given him and that was all there was to
t is all there was to it then your verdict should be
fendant."

y must have understood from this instruction that it
e duty of the defendant to provide a safe place for
y of goods, and that the plaintiff's servant after he
e the car was, took his chance of unloading the grain
me, and in such way as would suit the convenience
endant in the running of its trains, and that constant
n would be required by him to avoid injury.

struction was wrong, and as an exception was prop-
it must be sustained.

aining exceptions relate to the exclusion of evidence.
was said by the agent after the accident relating to
the spur track as a delivery track was a statement
by him in the performance of his duty, and could not
defendant as an admission of liability: Boston etc.

R. R. Co. v. Ordway, 140 Mass. 510, 512, 5 N. E. 627; W
ton v. Boston etc. R. R. Co., 158 Mass. 185, 33 N. E. 39

The question put to the civil engineer, and excluded
not appear to have prejudiced the plaintiff, for it is not
what answer the witness was expected to make: Lee v. T
183 Mass. 53, 54, 66 N. E. 431.

But the exclusion of evidence that the space between th
and side tracks was the place which other consignees of f
or their servants, were told by the station agent to go i
use, for the purpose of unloading goods from the ca
wrong.

Such instructions given by the agent were within the
of his employment, and binding on the defendant: L
Boston [397] etc. R. R. Co., 112 Mass. 455. And it was c
tent for the plaintiff to show that the defendant's cust
way of delivering freight generally was to run cars up
spur track to be unloaded, and that while unloading th
signees would have to drive in between the spur track a
sidetrack. It consequently would follow that the r
adopted by the plaintiff at the time of the accident was
cordance with the direction of the agent and the general
of business with others, and hence should have been antic
by the defendant. While the transfer was being made
bound to see that neither the plaintiff nor his property w
jured by any act of negligence on its part: Maguire v.
burg etc. R. R. Co., 146 Mass. 379, 382, 15 N. E. 904.

Exceptions sustained.

A Carrier's Liability, as Such, is not Terminated in the case
transportation of grain, coal, lumber and the like, until it pla
car at a safe and convenient place for unloading: See the
graphic note to Denver etc. R. R. Co. v. Peterson, 97 Am. St. R

One Who Drives Between the Tracks of a Railroad, at the di
of the station agent, to load wood from his wagon into a ca
assume that his position will not be rendered hazardous by th
ligence of the railroad company, and is not bound to exercise th
degree of care in looking and listening for approaching trains
would if not so engaged: Chicago etc. R. R. Co. v. Crose, 214 I
ante, p. 135.

WELDON v. PRESCOTT.

[187 Mass. 415, 73 N. E. 536.]

VATE WAYS, Presumption as to the Use of.—The use e way by the public is presumed to be permissive only.

VATE WAYS, Liability to Persons Injured in.—One using vay for his own business on the property of another is a ee, and cannot recover for injuries suffered from falling or excavation filled with hot water. (p. 414.)

ions of tort for personal injuries received from fall- hole or excavation filled with hot water. The judge the plaintiff was not entitled to recover, and ordered r the defendants in both cases. The plaintiff alleged

Pingree, for the plaintiff.

lder, F. H. Pearl, J. P. Sweeney, C. H. Poor and E. for the defendants.

MMOND, J. Phœnix Row was a private way; and, e was evidence that it was used to a considerable ex- e public as such, the presumption, in the absence of o the contrary, is that it was constructed and main- the use of the owners and occupants of the abutting such other persons as had occasion to visit them, and se of it by the public was merely permissive: Moffat 174 Mass. 311, 54 N. E. 850. In this case there is control that presumption.

intiff contends that at the time of the accident he was street not as one of the public, but as one having ith Shute, a tenant of a portion of the Hotel Thorn- abutted on the way. We think there is no founda- hat claim. Upon the plaintiff's own uncontradicted he entered the way for the purpose of going to his usiness on Washington street, and with no intention g either at the Hotel Thorndike or any other build- d abutting on the way. When he arrived about oppo- otel, Shute "attracted his attention and called him [Shute's] place of business." Shute wished to see iff "upon a matter of business, and after a few mo- nversation, the plaintiff, together with one Whittier,

left" the building and entered upon the way "for the pu of proceeding to the plaintiff's own place of business." proceeding a short distance with that intention, he fell int hole and was injured. The purpose of entering the street passing through it had no reference whatever to his call Shute. That call was a mere episode. Before he respond Shute he was upon [417] the street as one of the public, mere licensee, and after he left Shute's store he resume original position as such. The principles governing the which the owner of land or a building abutting on a pr way owes to a mere licensee have been so thoroughly disc in recent cases that it is necessary only to refer to them. case is distinguishable from cases like Holmes v. Drew, Mass. 578, 25 N. E. 22, and must be classed with cases Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850. Unde principles laid down in the latter case and cases therein it is clear that the evidence would not have warranted a dict for the plaintiff.

This conclusion as to this part of the case renders it unn sary to consider the other grounds of defense.

Exceptions overruled.

The Use of Private Ways is discussed in the monographic n Bakeman v. Talbot, 88 Am. Dec. 279-282. And the rights and o tions of parties to private ways are considered in the monog note to Dudgeon v. Bronson, 95 Am. St. Rep. 318-330.

FLETCHER v. BOSTON AND MAINE R. R. CO

[187 Mass. 463, 73 N. E. 552.]

CARRIERS—Passenger, When not in the Exercise of Due A passenger who, after the name of his station is called, and the train is moving slowly, leaves the car and stands upon the f four steps leading from the side of a platform at the end of th and, while there, is thrown to the ground and injured by the co of the car and a team owned by a newsdealer, is not in the ex of due care, and can neither recover from the railway nor fro newsdealer. (p. 415.)

CARRIERS—Passenger, When not Justified in Leaving M Train.—Even though the announcement of a passenger's statio be treated as an invitation to leave the car, it is not an invitat leave it while in motion. (p. 416.)

RT-FEASORS, Liability of, When not Joint.—If a passenger ay receives an injury from the collision of the train with a ed by a newsdealer, the railway company and the news- not liable as joint tort-feasors, though both are negligent.

of tort against the Boston and Maine Railroad and nst George C. and Arthur D. Prince, newsdealers, to or injuries resulting from the plaintiff's being thrown rain of the defendant railway company. The trial ered a verdict in favor of all the defendants, and plain- ed exceptions.

French and E. L. Curtiss, for the plaintiff.

Tisdale and E. J. Rich, for the railroad.

Burke and J. F. Corbett, for the defendants Prince.

RALEY, J. Before the plaintiff can recover against e railroad or the individual defendants, he must offer dence that at the time of the accident he was in the f due care.

ars that he properly became a passenger on a train of dant railroad, and took a seat in the smoking com- of a combination car, the other part of which, next omotive, was used for baggage.

t his seat some time before reaching his destination, the baggage compartment, and engaged in conversa- the baggage-master, who, when the train approached purpose of stopping, called the station at which the was to alight. After this as the train was moving e plaintiff left the car and stood on the first of four led from the platform of that end, and while in this he steps came into collision with a truck in charge of of the other defendants, who was in the act of placing a space between two parallel tracks, over one of which was passing. When the truck was caught by the mov- it struck the steps, bent them under the platform, and e plaintiff to be thrown to the ground and injured.

, if he had remained in the car until the train stopped er would have been avoided, but he voluntarily left a vided for him as a passenger, and where he would have , and exposed himself to the chance of injury which xperience has shown is incident to standing upon the of a moving railroad car.

The fact that the station had been announced, and the was being reduced in speed preparatory to stopping, or th combination of conditions causing the accident were pec and ordinarily not to be anticipated, do not furnish a suff excuse for his conduct: See Manning v. West End St. Ry 166 Mass. 230, 232, 44 N. E. 135.

Even if it could be found that the baggage-master, be servant of the railroad, properly might announce the st for [465] the information of passengers, who would be jus in treating such an announcement as an invitation to lea car as held in Flotrup v. Boston etc. R. R. Co., 163 Mass. 39 N. E. 797, yet this is not an invitation to leave a train in motion, but after it has stopped. At the furthest it aff no justification for the plaintiff to leave the car, and att to finish his journey on the platform or steps: England v. ton etc. R. R. Co., 153 Mass. 490, 492, 27 N. E. 1.

As the plaintiff was not compelled by necessity arising insufficient means of transportation furnished, or by the agement of its train on the part of the carrier, or misl an invitation to leave the place properly provided for his veyance, the action taken by him was for his own conveni and at his own risk: Hickey v. Boston etc. R. R. Co., 14 429; Files v. Boston etc. R. R. Co., 149 Mass. 204, 20 Am. St. Rep. 411, 21 N. E. 311.

The plaintiff also seeks to hold all the defendants as tort-feasors, but the alleged wrong from which he suffere not within that class of tortious acts for which, if intende who participate may be held liable, either severally or joi McAvoy v. Wright, 137 Mass. 207, 210.

His injury arose from an alleged breach of duty of the road to safely transport him as a passenger, and with the formance of this service the other defendants were not nected: Stone v. Dickinson, 5 Allen, 29, 31, 81 Am. Dec.

It may be assumed that the original and amended de tions contained sufficient allegations in the various coun charge the individual defendants, either jointly with the road, or as severally liable. But it is clear, since there but one injury by whomsoever caused, that the contributory ligence of the plaintiff likewise prevents his recovery ag them under any form of pleading: Murphy v. Deane, 101 455, 466, 3 Am. Rep. 390.

Exceptions overruled.

uncement of a Station as an invitation to passengers on a ht is discussed in McGee v. Missouri Pac. Ry. Co., 92 Mo. St. Rep. 706; Smith v. Georgia Pac. Ry. Co., 88 Ala. 538, Rep. 63.

Duty and Liability of a Carrier to a passenger who takes or dangerous position on a car, see Files v. Boston etc. R. Mass. 204, 14 Am. St. Rep. 411; Parks v. St. Louis etc. Mo. 108, 101 Am. St. Rep. 425; and cases cited in the ce note thereto.

DESSEAU v. HOLMES.

[187 Mass. 486, 73 N. E. 656.]

TGAGE.—An Agreement to Waive the Mortgagor's Right on is against public policy, and therefore void. (p. 419.)

ITIONAL SALE, Agreement to Waive Right of Redemp- y Statute.—If a statute gives the purchaser under a con- a right of redemption after default in payment, notwith- agreement that his rights shall be lost, a contract waiving and providing that, upon default in any payment, the take possession of the property without furnishing any tement of the amount due, is against public policy and (p. 419.)

the conversion of a couch which the plaintiff had the defendant upon a contract of conditional sale. ust 10, 1903. The defendant relied upon an agree- riting signed by the plaintiff as follows:

d of Holmes, Luce & Co., a true copy of the above 3,653, the conditions of said lease having been fully by me before signing, and the said Holmes, Luce agreeing to accept the above lease No. 73,653, and articles named therein, except upon the execution wing agreement by me: Wherefore, in consideration very to me of the goods named in said lease, I do myself, my heirs and assigns, agree with the said uce & Co., that upon the breach by me of any of the of said lease, to permit said Holmes, Luce & Co., s or representatives, to take possession of the prop- oned in said lease, and without furnishing me with statement of the amount due upon said lease, and I aive and do hereby, for myself, my heirs and my ive all rights of every kind which I, or they have or to be given or to receive notice of any kind, or any

itemized statement, particularly waiving all rights which they may have under section 13, chapter 198, of the R Laws of Massachusetts.

"Witness my hand and seal this tenth day of August, 1903.

"HOWARD L. DESSEAU

On the plaintiff's failure to make some of the paymen on the contract of sale, the defendants took away the without notice to the plaintiff and without furnishing hi itemized statement of the amount due. The trial judge for the defendants, and the plaintiff alleged exceptions.

W. R. Buckminster, for the plaintiff.

J. E. Crowley, for the defendants.

487 KNOWLTON, C. J. The defendants sold to the tiff a couch, by a conditional sale in the form of an instr in writing called a lease, which provided for payments dollar per week until the sum of thirty-one dollars and cents, with interest, should be paid in all, at which tin property was to pass to the plaintiff. This writing pur to authorize the defendants to take possession of the pr at any time, for a failure to make the prescribed pay and afterward to hold it absolutely. Similar contracts been made for many years, and in the year 1881 the l ture passed an act (Stats. 1881, c. 222) giving purchas the future, under such contracts, a right of redemption default in payment, notwithstanding the provision in the ing that their rights should be lost by their neglect. tional enactments have since been made, from time to for the extension and preservation of this right, all of appear in substance in the Revised Laws, chapter 198, se 11, 12, 13: See Stats. 1884, c. 313; Stats. 1892, c. 411; 1898, c. 545.

As a part of the transaction of purchase, the plaintif cuted a separate instrument in which he undertook to wai his rights under the Revised Laws, chapter 198, sectio and to authorize the defendants, upon his failure to mak ments as agreed, to take immediate possession of the pr without giving him 488 an itemized statement of the a due upon the lease, and to hold it free from any right demption. The only question in the case is whether th strument is binding upon the plaintiff.

ementary law that an agreement to waive the right to redeem a mortgage, made by a mortgagor at the ecuting the mortgage, is void as against public policy: quity Jurisprudence, sec. 1019; Bayley v. Bailey, 5 510; Waters v. Randall, 6 Met. 479, 484. The rea- e rule is that improvident persons, in straits to obtain ould be likely to make contracts, the literal enforce- which would work great hardship upon them, to the of the public as well as themselves. Referring to the Judge Story says of an agreement that there shall t of redemption under a mortgage, "Such a stipula- eld void, as being inhuman and unjust": Sec. 1009. s for this rule in reference to common mortgages are ger in the application of it to conditional sales of roperty, which are made so commonly by shopkeepers ng householders of small means with furniture and lar articles. The statutes referred to evidently were r the protection of such persons. It is very plain egislature intended to say that the usual provisions iate forfeiture in such contracts should be ineffectual n contracts made after the enactment of the statute. be that the same provisions embodied in a separate nade at the same time as the conditional sale, can ferent effect.

y v. Griffin, 181 Mass. 229, 63 N. E. 420, it was ccordance with the intimation in Wall v. Metropoli- Exchange, 168 Mass. 282, 284, 46 N. E. 1062, that not to sue under the Statutes of 1890, chapter 437, dvance by one about to open an account for the pur- sale of stocks, bonds and other securities, is void as ublic policy. As the statute now in question rests nds of public policy, it is not in the power of one be directly affected by it to contract in advance that disregarded.

ons sustained.

Between Mortgagor and Mortgagee to waive or release the edemption are discussed in the monographic note to Brad- avenport, 55 Am. St. Rep. 100-111. Courts of equity, if t declare such contracts unenforceable, regard them with assem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160.

TUTTLE v. FIRST NATIONAL BANK OF GREENFI

[187 Mass. 533, 73 N. E. 560.]

TRUSTEE, Pledge by.—A trustee having power to inve trust property according to his best judgment, and to pay ov income from time to time to the beneficiaries, and to chang investment at discretion, has no authority to pledge any part trust property as security for the payment of a promissory note by him as trustee, although the money received goes into the fund, and is expended for purposes for which the income could fully be appropriated. (p. 421.)

TRUSTS.—The Note of a Trustee is His Personal Oblig enforceable against him alone while living, and, after his against his estate. (p. 421.)

TRUSTEE, Duty of Inquiry of Persons Dealing With.— the form of a stock certificate and the accompanying power torney show that the shares are held in trust, all persons dealing them are thus put on inquiry, and must be held to know th trustee has no authority to pledge them as collateral security obligation which is in law his individual debt. (p. 421.)

TRUSTEE, Unauthorized Pledge by, Pledgee has no Rem Equity.—Where a trustee has, without authority, pledged to a shares of stock belonging to the trust, of which the bank has it has no title, and equity will not, as against a successor trustee, enforce the repayment of moneys to secure which the was given, though they were used for the benefit of the trust (p. 421.)

Two suits in equity, the one by the trustee under the w Horace S. Stebbins praying that the defendant, First Na Bank of Greenfield, be ordered to assign and deliver to seven shares of the capital stock of the defendant, Fra County National Bank, alleged to have been pledged b plaintiff's predecessor as trustee to secure his note for the of five hundred and fifty dollars, such note and shares of having been transferred to the first named defendant. second suit was by the First National Bank of Greenfield ing for a decree that the shares of stock be sold and the ceeds applied to the payment of the note executed by the inal trustee. In the first case, the court granted the prayed for, and the second case was ordered dismissed. First National Bank of Greenfield appealed in both cases

F. J. Lawler, for the First National Bank of Greenfie

F. L. Hayes, for the trustee.

534 BRALEY, J. These two bills in equity grow out o same transaction, and involve the right of a trustee wi

thority under the terms of the trust, to pledge a part
incipal to secure the payment of a promissory note
him as trustee, the proceeds of which are used for
it of the estate, and whether the bank, as pledgee,
k with notice of the trust acquired a title that will
to retain and apply the collateral in payment of the

the provisions of the will of Horace S. Stebbins,
ich the maker of the note was trustee, he was directed
red to invest the property "according to his best judg-
discretion," and to pay over the income from time
s it accrued to the beneficiaries, with "full power to
ny investment at his discretion."
s power did not clothe him with authority to pledge
of the fund as security for the payment of a promis-
made by him as trustee although the money thus re-
nt into the trust funds, and was expended for pur-
which the income lawfully could have been appropri-
yt v. Jaques, 129 Mass. 286, 287.
of the absence of authority, and notwithstanding the
the body of the note, and form of its execution, the
was his personal obligation enforceable against him
le living, and after his death against his estate: Stats.
533, sec. 20 (Rev. Laws, c. 73, sec. 37); Fiske v.
12 Gray, 474, 475; Towne v. Rice, 122 Mass. 67;
v. Goodell, 126 Mass. 119, 120.
time of the negotiation of the note the original payees,
equently the defendant bank, which held title under
orsement, had notice by the form of the stock certifi-
accompanying power of attorney, that the shares were
rust. They were thus put upon inquiry, and must
have known what it was their duty to ascertain that
e had no authority to pledge them as collateral secur-
obligation that in law was his individual debt: O'Her-
ay, 168 Mass. 573, 576, 60 Am. St. Rep. 411, 47 N.
0 L. R. A. 498, and cases cited.
e further contention of the bank that even if it has
o the stock which it can enforce against the present
at because the money hired was used in part to pay
the estate, and the remainder presumably in the form
was paid to the beneficiaries, it should be permitted
in its bill to have the income of the trust already
r as it accrues applied in payment of the note. But

as we have said it had no contract which bound the estat
for this reason it stands no better in equity than at law
sides, as the bank must surrender the stock because it
title, now to require the income to be appropriated to th
ment of [536] the note would be to say that while no part
principal could be applied, the income might be taken, al
the terms of the trust alike forbid the devolution of eith
such a purpose.

Decree affirmed in each case.

Persons Dealing With a Trustee must generally take notice
scope of his authority: Kirsch v. Tozier, 143 N. Y. 390, 42
Rep. 729. As to whether persons dealing with pledged stock s
in the name of one as trustee are put on inquiry as to the ch
and limitations of the trust, see the note to Central State B
Spurlin, 82 Am. St. Rep. 516. It is held that a guardian has n
to pledge a certificate of stock standing in the name of his
O'Herron v. Gray, 168 Mass. 573, 60 Am. St. Rep. 411.

CASES

IN THE

UPREME COURT

OF

MISSISSIPPI.

BUFFINGTON v. THOMAS.

[84 Miss. 157, 36 South. 1039.]

LS—Letter as Holograph.—A private letter, testamentary r, wholly written, dated and signed by the testator, re- answer from the addressee, and that the latter should ntents of the letter private, is a valid holographic will, ever answered, and although the testator lived several er writing it. (p. 424.)

er in dispute reads as follows:

"San Antonio, Tex., Dec. 25, 1898.

ard Drenning.

'riend—This leaves me in bed with high fever. I do whether I shall live to see morning. I came to West my health and did very well until lately. I was fever, from which I may never recover. You have lhood always shown yourself a friend. Now, I am e one more favor to ask: in case that I die see that gton has nothing of mine, not even a lock of my hair. what she could for me and I want her to have our Yazoo City. Buffington has not given me a copper. y more, but am too sick. Answer at once.

"Truly Yours,

"MAMIE BUFFINGTON.

is private.)"

ter was never answered and the writer did not die al months after it was written. From a decree pro- establishing the letter as a valid will, the contestant

Barnett & Perrin and Harris, Powell & Harris, for
pellant.

Ricketts & Peyton, for the appellee.

163 CALHOON, J. The instrument was properly p
as a will. The acute attack of fever was the inducer
the woman to indicate her last wishes, and her domina
was to express them, and to say what she wanted "in
die," and she gives her reason for the wish. The req
"answer at once" perhaps indicates only the desire t
whether the letter reached its destination. There is
sumption that it was designed to alter its nature. An
the words "this is private." From the purport of the
paper, manifest reasons would militate against publicati
ing the life of the writer: Anderson v. Pryor, 10 Smede
620; Redhead v. Redhead, 83 Miss. 141, 35 South. 76
opinions," Eaton v. Brown, 193 U. S. 411, 24 Sup. C
487, 48 L. ed. 730.

Affirmed.

Holographic Wills are discussed at length in the recent
Estate of Fay, 104 Am. St. Rep. 22-34.

AYCOCK v. HAMPTON.

[84 Miss. 204, 36 South. 245.]

PARENT AND CHILD—Custody of Illegitimate Chil
putative father of an illegitimate child is entitled to its cu
against all but its mother, and, if she is dead, and the fat
suitable person, he is entitled to the custody of such child as
its maternal uncle. (p. 425.)

Habeas corpus by the putative father of a bastard child
mother was dead, to obtain the custody of such child as
its maternal uncle.

Judgment denying the prayer of the petition and p
appealed.

Lamb & McKenzie, for the appellant.

Boone & Curlee, for the appellee.

207 WHITFIELD, C. J. The putative father was
to the custody of his illegitimate daughter, about ele
twelve years old. There is nothing to show that he was

rson to have the custody of his child. The learned
ow seems to have [208] proceeded on the idea that a
father had no legal standing to maintain a writ of
rpus. The case of Morlitz v. Garnhart, 7 Watts, 302,
ec. 763, states the true rule. The court say: "Though
be not looked upon as a child for any civil purpose,
f nature are respected in regard to its maintenance.
tive father, though not legally related to it, is so far
l its natural guardian as to be entitled to the custody
King v. Cornforth, 2 Strange, 1162, the court granted
ation for the abduction of a natural daughter from
ction of her putative father, thinking that a bastard
the 4 and 5 Ph. & M., c. 8, which punishes the
ay of any maid or unmarried woman child from the
of the father, mother or person having the govern-
t. Between the father and the mother, however, the
ms to have the prior claim: Ex parte Knewe, 1 N. R.
Rex v. Cornfoot, 1 Boot's Poor Laws, 465, it was held
tative father has a natural right to the care and edu-
his illegitimate child; and in Newland v. Osman, 1
oor Laws, 466, he was allowed to take it from the
d maintain it. It may be safely said, then, that the
gnizes the rights of putative paternity for purposes
e and education." Pote's Appeal, 106 Pa. St. 574, 51
540, also lays down the same doctrine, the court there
That the putative father was a proper person to pre-
petition cannot, we think, be doubted. The putative
an illegitimate child is entitled to the custody of
as against all but the mother. If the mother be dead,
father a suitable person, it shall be taken from the
grandparents and delivered to him": Commonwealth
son, 1 Ashm. 55. To the same effect are the English
chards v. Hodges, 2 Saund. 83; Burwell's Case, Vent.
man's Case, Vent. 210; and Newland v. Osman, re-
in Burne's Justice, 234. In Moritz v. Garnhart, 7
02, 32 Am. Dec. 762, it was said that, although a
nay not be looked upon as a child for any civil pur-
the ties of nature are respected in regard to its main-
The putative father, though not legally related to it,
considered its natural guardian as to be entitled to
dy of it. The learned Chief Justice Lewis, deliver-
pinion of the court, after a full discussion of all the
ncludes as follows: "It may be safely said, then, that

the law recognizes the rights of putative paternity for pu
of nurture and education. We may allow large abate
perhaps, from the estimate which the law makes in resp
the natural tenderness of parents for their own offspr
cases like this, but it is certain that the rule referred
grounded in that consideration." The 3 American and E
Encyclopedia of Law, second edition, page 888, states th
as follows: "The mother, as guardian by nurture, has the
to the custody and control of her bastard child until it
have attained an age when it can, in contemplation of th
make an election between father and mother. If, on the
hand, the mother is dead, the father has the right to th
tody and control of the child." The distinction betwe
right of a bastard to assert its rights for any civil purpo
the courts is a very different one from that which enti
to have the ties of nature, as regards its maintenance an
ture, enforced.

Reversed and remanded.

The Mother of an Illegitimate Child is prima facie entitled
custody. But the putative father, if a proper person, is enti
its custody as against all but the mother: See the monograph
to Brooke v. Logan, 2 Am. St. Rep. 185, 186; Marshall v. Re
Fla. 499, 37 Am. St. Rep. 118.

OSTRANDER v. QUIN.

[84 Miss. 230, 36 South. 257.]

INFANCY—Contracts—Misrepresentation—Estoppel.—A
ful misrepresentation by an infant that he is an adult, by
money of another is had on a mortgage, and which deceives the
is a bar to an avoidance of the mortgage, on the solicitation in
of the borrower, especially when the fruits of the fraud are n
dered back, and are expended for necessaries. (p. 427.)

Denton & Cox, Betts & Sturdevant and F. Johnston, f
appellant.

W. Baldwin, for the appellee.

234 CALHOON, J. This record presents a bill by ap
to enjoin a sale of land by the trustee in a trust deed
cure appellee, without tender of the money had, on the g
that appellant was a minor when she made it. Mrs.

s up ignorance [235] of the age of Mrs. Ostrander, he (Mrs. Quin) was a widow, of limited means, and ant came to her and said she was in great need and money for the necessaries of life; that she was of ompetent to make the deed; and that, believing and this statement, she loaned the little money she had, otherwise she would not have done so; and that ap- use it for the necessaries of life. Mrs. Ostrander ure woman, over eighteen years of age, and of dis- The testimony was conflicting, but the chancellor thought, from the evidence, that the answer was and that the misrepresentations were made and re- nd he decreed for appellees. The willful misrepre- of age by which money is had of another on a mort- which deceives the lender, is a bar to an avoidance of olicitation in equity of the borrower, especially where of the fraud are not tendered back: Ferguson v. Miss. 121; Levy v. Gray, 56 Miss. 318; Brantley v. Miss. 430; Yeager v. Knight, 60 Miss. 732; Wilie v. Miss. 542; Upshaw v. Gibson, 53 Miss. 341.
l.

IELD, C. J., Specifically Concurring. I concur on ground that the chancellor found, on the evidence, money borrowed was used in the purchase of neces-

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t of an Infant's misrepresentation as to his age as affect- t to avoid his contracts is considered in the monographic ig v. Van Bebber, 18 Am. St. Rep. 633-637. For recent on this question in its application to deeds, see Damron v. lth, 110 Ky. 268, 96 Am. St. Rep. 453; Ridgeway v. Her- o. 606, 73 Am. St. Rep. 464.

CITY OF CANTON v. CANTON COTTON WAREH COMPANY.

[84 Miss. 268, 36 South. 266.]

MUNICIPAL CORPORATIONS—Evasion of Police P by Railroad Company.—If a corporation contracts to furnis road company with water through conduits, but has no p construct and maintain them across the streets of a city in w water is to be delivered, while the railroad company posses power, the latter may construct and maintain such conduits, being guilty of an illegal evasion of the police power of t (p. 432.)

RAILROADS—Power to Cross Streets.—A railroad having power to construct and maintain water mains along of way, and across public streets, has like power to contr others to do the work. (p. 432.)

RAILROADS—Lease by Foreign Company.—A statute izing a foreign railroad company to lease domestic railroad co may be broad enough to invest the lessee with all of the fr and powers of the domestic companies. (p. 437.)

RAILROADS—Power to Cross Streets.—A railroad having power granted it to cross any public road or way h to cross streets, as well as country highways, and its lessee invested with like power. (p. 437.)

MUNICIPAL CORPORATIONS — Legislative Powe Streets.—The legislature has power to devest a municipalit control over its streets, and to authorize their use by cor without compensation to the municipality. (p. 438.)

RAILROADS—Right to Construct Conduits Across St railroad company having the right to do all acts incidents maintenance of its road may lay conduits under the surfa right of way, and under and across public streets of a city, to bring necessary water from the source of supply to the use. (p. 440.)

RAILROADS—Incidental Powers.—In the construction tenance of its line of road, a railroad company is vested such incidental powers as may be requisite for the successful mation of the object for which it was granted corporate e (p. 440.)

RAILROADS—Lessee—Powers—Eminent Domain.—T of a railroad invested with all of the lessor's powers, an the right to do all acts incidental to the maintenance of t has a right to lay conduits under the railroad right of way der and across public streets in order to bring necessa from the source of supply to the place of use, although i right to exercise the power of eminent domain. (p. 441.)

RAILROADS — Lessee — Temporary Obstruction of Nuisance.—A temporary and partial obstruction of a public a railroad company or its lessee, in laying necessary conduit a nuisance, which is subject to be enjoined. (p. 442.)

Green & Green, for the appellant.

Harris, J. M. Dickinson, A. K. Foote and J. B.
for the appellees.

LY, J. The parties to this litigation are (1) the
ıton, a municipality of this state incorporated by
ıuthority in 1836, and by operation of law clothed
jurisdiction in the matter of streets," and having
egulate the crossing of railways"; (2) the Canton
rehouse Company, a private corporation operating
arter authorizing it to manufacture ice and sell
possessing no municipal franchise empowering it to
nder the streets of the city; (3) the Illinois Central
ompany, a foreign corporation operating and main-
ailroad through this state from its southern to its
undary by virtue of a lease from the Chicago, St.
New Orleans Railroad Company. The city was
t below, and the other parties defendant, to a bill
chancery court of Madison county.

s giving rise to this litigation are these: The rail-
ed and maintained by the Illinois Central Railroad
ıns through the city of Canton, traversing its streets
l tracks, and has so run for more than forty years.
ı division or relay station on the railroad, where a
is maintained and where the cars and engines
ains are changed. In the ordinary operation of its
that place, the railroad company consumes from
ndred thousand to one hundred and fifty thousand
water daily. To procure the needful supply, it has
ls on its property, but the wells frequently failed,
water was obtained from the municipal waterworks
ve cents per one thousand gallons by agreement and
the city authorities, or the engines were taken to
ts where the necessary water could be procured.
of this was that, if an engine had to be taken else-
vater, it entailed considerable inconvenience and de-
if the water was obtained from the city, there con-
e disputes as to the amount consumed. The power-
e Canton Cotton Warehouse Company, where it con-
business of manufacturing ice, was adjoining the
ay of the rai[illegible] about seventeen hundred feet
ıe roundhou[illegible] railroad water tanks were
. In the [illegible] business of manufactur-
warehous[illegible] as compelled to
s premises[illegible] was needed by

the railroad for the running of its locomotives and oth
dental uses. This condition of affairs brought about
tions between the parties which resulted in a contract b
tered into between the warehouse company and the
company, as follows: The warehouse company agreed
nish and lay a four-inch water pipe from its pumping
to the tanks of the railroad company, and to connect w
pipe two first-class meters, to determine the amount o
consumed by the railroad company; the railroad compan
ing to pay three cents per one thousand gallons furnish
contract to last five years from date. Before the pipe
laid according to the terms of this contract, it was dis
that the warehouse company had no franchise empow
to lay pipes in or across the public streets; and it was
seen that in laying the water main it would be necess
it to cross two of the public streets of the city—namely
and Fulton streets—across both of which the railroad
tained, and had maintained for many years, its c
281 Acting upon legal advice to avoid a conflict with t
nicipal authorities over the legality of their action, th
tract was abandoned, and subsequently another entere
whereby for the same price per one thousand gallons, th
house company contracted to furnish the water, but t
road company agreed to furnish and lay the requisi
For purposes of convenience, a six-inch main was sub
for the four-inch as stipulated in the original contra
pursuance of this contract the railroad company un
to lay the water main from the pump station of the wa
company into the right of way of the railroad compa
thence south on said right of way to its own water tank
it was prevented by an injunction issued on behalf of t
The grounds on which the city prayed for and obtained
suance of the injunction restraining the prosecution
work were: 1. That this was a collusive and evasive sch
tween the warehouse company and the railroad company,
by it was sought to evade the police power of the c
afford the warehouse company an opportunity to fur
private business by the sale of its water. 2. That t
nois Central Railroad Company simply owned a leaseh
tate in the railroad which it operated, and that it had
to exercise the right of eminent domain under the t
its lease, and that the laying of this water main nece
the exercise of this power, because it constituted the es
ment of a new servitude on highways, and it was furth

ie connection, that the railroad lessor had no right of
gh the city of Canton, and its tracks had been laid
maintained simply by acquiescence on the part of
ipal authorities. 3. That in the prosecution of this
ould be necessary to dig a trench across the public
ntioned, in order to install the water main, and that
g of this trench and the necessary reopening of the
enever repairs were needed would constitute a con-
iisance, and an unauthorized taking of public prop-
or private purposes, and would inflict irreparable
public and city, for which there existed no adequate
law.

rmine the question of whether or not the arrangement
e railroad company and the warehouse company was
collusive, we need only look at the attendant cir-
s, in order to ascertain that the contract was based
t business principles. Here was one corporation
product to sell, and another corporation whose needs
that product; the one being clothed with power to
he other being vested with power to buy. The rec-
es that the contract was to the mutual advantage
ties. The warehouse company was seeking to dis-
waste or by-product at an advantage; the railroad
was procuring a needed supply of water, of a bet-
, more suitable for its use, more conveniently ob-
d at less cost than it could be otherwise procured.
se of the contract was legitimate, and contravened
le of law or morals. The fact that under its pro-
railroad company procured water cheaper than the
authorities would supply the private citizen in no
s the legality of the transaction. The railroad of-
the right to buy where they could procure the needed
water cheapest, and their action was based on good
rinciples, and was strictly in accordance with their
e stockholders of the company. Both parties to the
ere within their legal rights, and so there was nothing
and no necessity for collusion or evasion. Nor can
r motive be attributed to their action in the abandon-
he original contract, and entering into another by
railroad company was to furnish and lay th
is manifest that this change in the terms o
due to the fact of the discovery that the
possessed no municipal fra[illegible] vesti

power to construct water mains across the public stree
283 this fact being proven, it nevertheless remains tru
the purpose of the contract, the object in view, the end
both parties sought to attain, was strictly legal. The r
company wanted the water; the warehouse company
to sell it. The seller had no authority to lay the delivery
It was thought the buyer had. So the buyer assumed
pense entailed by the construction of the requisite water
This was not a violation of the law, but a commendable
to keep within its pale; to prevent friction between th
tracting parties, on the one hand, and the municipal auth
on the other; and to still carry into effect in a perfectl
way the contract which was for their mutual pecuniary
Assuming the power of the railroad company to lay
mains for its own private purposes on its own right of
must be conceded that, if the mains were not intended t
the public streets, the contract in question would be abo
picion, and the warehouse company could, with the cons
the railroad company, have laid the main along its right
The change in the contract was in no sense an attempt to
the police power of the city. If the Illinois Central R
Company had the power to construct and maintain water
along its right of way and across the public streets, it ha
power to contract with others to do the work. And this
us to the consideration of the material inquiry presen
this record.

Has a railroad company the right to construct water
along its right of way, and if so, has it the like pow
construct such mains over the public streets of a municip
But first, and as preliminary to this question in the
case, the attitude of the Illinois Central Railroad Co
must be considered. It is contended by appellant tha
company, being a foreign corporation, is not vested wi
power to exercise the right of eminent domain in this sta
that the laying of the water main on its right of way is t
position of an additional servitude, and hence calls f
284 exercise of the power of eminent domain before such
can lawfully be constructed. It is said further that, con
as an abstract question, that railroad companies owning
rights of way have the power to construct water mains
purpose of procuring a needed supply of water, still in
stant case the Illinois Central Railroad Company is not
with like power, for the reason it is the lessee only of th

it operates, and is only clothed with the power and ed by the terms of its lease; and still further it is hat its lessor never had a legally acquired right of the city and across the streets of Canton, and that tion of its tracks and the subsequent maintenance solely due to the acquiescence of the citizens and al authorities of said city. The consideration of tions requires a proper understanding of the unts, and this renders indispensably necessary a brief of the laws to which the presence of the Illinois lroad in this state is to be attributed. The Illinois lroad Company in the year 1882, being first thereempowered by the legislative authority of the state , p. 1023, c. 559), entered into a contract of lease of four hundred years with the Chicago, St. Louis rleans Railroad Company. By virtue of this lease ompany leased, granted and demised unto the Illil Railroad Company its railroad, "extending from New Orleans, in the state of Louisiana, through the uisiana, Mississippi, Tennessee and Kentucky, to the south bank of the Ohio river," including all y, depot buildings and grounds, and all other prophe appurtenances thereunto belonging, and containther delegation of power: It (the Illinois Central mpany) was expressly granted the power "to have, se and enjoy all the rights, powers, privileges and which can be lawfully exercised and enjoyed in or aid railroad and other demised premises, and the t, [285] control and operation of the same, as fully, entirely as the same might or could have been held, enjoyed by the said party of the first part [the Chiuis and New Orleans Railroad Company], had this ot been made." This operated as a full and comiture in the Illinois Central Railroad Company of ts, powers, privileges and franchises which its lessor d or possessed. What were those rights, and what d the lessee enter into possession of under this Chicago, St. Louis and New Orleans Railroad s the result of several preceding consolidations be- and different railroad corporations. Its immediate were the Central Mississippi Railroad Company w Orleans, Jackson and Northern Railroad Com- y the supplementary act ratifying the consolidation

of these two companies into the Chicago, St. Louis an
Orleans Railroad Company, and incorporating the last
company, the said Chicago, St. Louis and New Orlean
road Company was expressly declared to be a corpora
the state of Mississippi, and, as such domestic corporati
"invested with all the rights, powers, privileges, liberti
franchises conferred by the act to which this is a supp
and especially the rights and powers of section 10 of
to insure the construction and completion of the New O
Jackson and Great Northern Railroad Company throu
state of Mississippi, and of section 10 of the act incorp
the Mississippi Central Railroad Company." Referring
acts of incorporation of the several companies, from th
solidation of which the Chicago, St. Louis and New O
Railroad Company resulted, and to which by each suc
act of incorporation or consolidation the rights, privileg
franchises of such companies were expressly granted, w
that the existence of a continuous line of railroad fr
southern boundary of the state, thence north through th
is expressly recognized, and its existence and enjoym
franchises acquiesced [286] in and continued. We find f
as bearing on this question, and showing the privileges,
and franchises granted by legislative act of this state, a
of which are expressly kept alive, and finally invested
Chicago, St. Louis and New Orleans Railroad Compan
following, arranged without reference to chronology:

"An act to authorize the consolidation of the New O
Jackson and Great Northern and the Mississippi C
Railroad Companies, and for other purposes. Ap
April 18, 1873 [Laws 1873, p. 567, c. 295.]

"Whereas, the New Orleans, Jackson and Great No
Railroad Company owns a line of railroad from New O
Louisiana, to Canton, Mississippi, and the line thence
ward to Jackson, Tennessee, is owned by the Mississipp
tral Railroad Company, but now leased to the Southern
road Association, a corporate body existing under the l
this state, and this line the parties concerned are now
extending to Cairo, Illinois, so that a continuous line o
road shall be formed from New Orleans to St. Louis, Ch
and all the railroads leading to the Atlantic seaboard a
Pacific coast, and looking to this end said parties have a
entered into contract with the Illinois Central Railroad
pany."

Section 3 of an act entitled "An act granting the right of way through the state of Mississippi, and other privileges, to the New Orleans, Jackson and Great Northern Railroad Company: . . . . Sec. 3. Be it further enacted, that said company are hereby invested with all rights and powers necessary for the construction, repair and maintenance of said railroad through this state, and may purchase such lands and materials for the same as they may consider necessary; and in case they or their agents cannot agree with any owner or owners of land or other material, upon the terms of purchase, or in case the owner shall be under the age of twenty-one years, or a nonresident of [287] the state, feme covert, or non compos mentis, said company may proceed to obtain title to said lands and materials as in the manner prescribed, and shall be invested with all the powers conferred by the sixth, seventh, and eighth sections of an act to incorporate the Hernando Railroad Company, approved May 13, 1837, so far as the same may be applicable to the construction of a railroad through this state from New Orleans to the line of boundary separating it from the states of Alabama and Tennessee."

Section 2 of an act entitled "An act to incorporate the Canton and Jackson Railroad Company: . . . . Sec. 2. Be it further enacted, that the president, directors and company shall have power and authority to build and construct said railroad with one or more tracks or railways from Jackson, in Hinds county, to Canton, in Madison county; and they and their agents, engineers or workmen may enter upon and use or excavate or embank any land which may be needed for the site of said railroad, or for the erection of any warehouses, depots, offices or any other buildings or works necessary or useful in the construction of said road, and may take and use any land, timber, gravel, stone or other materials necessary for the construction of said road, or its works, or to build, erect and repair bridges, culverts, dams or other things necessary for the same."

Section 13 of the same act: "Sec. 13. Be it further enacted, that whenever, in the construction of said railroad, it shall become necessary to cross or intersect a public road or highway, it shall be the duty of said president and directors so to construct said road across such public road or highway as not to impede the progress or transportation of persons or property along the same, or when it shall be necessary to pass through the lands of any person it shall also be their duty to

provide for such person proper ways to cross said railroad
one part of his land to another."

Section 2 of an act entitled "An act to incorporate the
Orleans and Jackson Railroad Company and for other pur
. . . . [288] Sec. 2. Be it further enacted, that wheneve
the construction of said road, it shall be necessary to cr
intersect any established road or way, it shall be the du
the president and directors of said company so to construc
road as not to impede the passage of persons or property
the said highway; and when it shall become necessary to
through the lands of any individual, it shall be their du
provide for such individual a proper wagon way across
road from one part of his land to the other; and where
road shall run through the inclosures of individuals, it
be the duty of said company to dig and keep in repair the
essary stock ditches in order to protect such inclosures."

Section 2 of an act entitled "An act to incorporate the
Springs Railroad Company: . . . . Sec. 2. Be it furthe
acted, that whenever, in the construction of the said rail
it shall be necessary to cross or intersect any established
or way, it shall be the duty of the said president and dir
so to construct the said railroad across any road alread
hereafter to be established by law, as not to impede the pa
or transportation of persons or property thereon; and wh
shall be necessary to pass through the land of any indivi
it shall also be their duty to provide for such individu
proper wagon way across said railroad from one part o
land to another."

By these references it becomes evident that the Chicag
Louis and New Orleans Railroad Company was clothed
complete power to do any and all acts which might be nece
to insure the successful maintenance and operation of it
of railroad throughout the state. The object which prec
legislation had in view was the encouragement of various
road corporations so as to insure the construction of a li
road which should run without break, traversing the
state, and link together the markets of the north and the
and factories of the south. This end had already been a
plished at the date of the incorporation of the Chicag
[289] Louis and New Orleans Railroad Company. The co
ous line of railroad was already in successful operation thr
out the state, and it was only necessary to clothe the con
then coming into existence and obtaining possession of th

with all necessary powers to insure its continued and successful operation. This company, in assuming charge and control of the railroad already constructed, was clothed, as successor, with all the powers, privileges and franchises with which each and every prior corporation had been by legislative authority invested. We think it absolutely indisputable that the acts referred to, recognizing and acquiescing in the enjoyment of a franchise by a railroad corporation through the state of Mississippi, and through each one of the municipalities mentioned in its charters and traversed by its line, considered in connection with the further fact that a right of way "from Jackson to Canton," and "from Canton northward," and "through the state," was in express terms granted to the corporations named, did do what they undertook to do, and that evidently was to grant and delegate to the Chicago, St. Louis and New Orleans Railroad Company full power to do all acts necessary to the completion of the construction and incidental to the subsequent maintenance of the road, wherever it might, under the terms of its charter lawfully be laid: Hazlehurst v. Freeman, 52 Ga. 245; Rio Grande R. R. Co. v. Brownsville, 45 Tex. 88; Morris etc. R. R. Co. v. Central R. R. Co., 31 N. J. L. 205, 212; Chicago etc. Ry. Co. v. Chicago etc. R. R. Co., 112 Ill. 589; Commonwealth v. Erie etc. R. R. Co., 27 Pa. St. 339, 67 Am. Dec. 475.

Power, as we have seen, was expressly granted to cross any "public road or way"; and it is now finally and firmly established by the adjudications of our own court and other authorities that these terms refer, unless a contrary intention plainly appears, not only to country highways, but to municipal streets as well: Hamline v. Southern Ry. Co., 76 Miss. 417, 25 South. 295; Smith on Municipal Corporations, sec. 1495; Elliott on Roads and [290] Streets, sec. 1, note 3, and cases cited. To hold that a grant of a right of way through a state did not carry with it the power to cross over highways of every description would be to render nugatory every act of incorporation granted to a railroad company. In the very nature of things, it would be impracticable, if not impossible, to specify in each act of incorporation every street and road, to be, or which might be, crossed by the projected railroad; and yet it is a matter of common knowledge that no railroad can possibly traverse a populous state without crossing many thoroughfares, both urban and rural. It was certainly not the intention of the legislature that the great march of progress in which railroads are so often the leaders could be interfered with or im-

peded by an arbitrary refusal to grant a right of way l
municipal body. To so hold would have the inevitable
of compelling railroad companies not to run through th
nicipalities of the state, but to avoid them. That this w
the legislative design, and is not the true view, but is d
violative of the public policy of our state, is plainly sho
all past legislation on this subject; and by reference to s
187 of our present constitution, where it is made comp
upon every railroad passing within three miles of any c
seat, even when not mentioned in its charter, to pass th
the same, and to maintain a depot, provided the town
citizens will grant a right of way and sufficient depot gr
therein; the object clearly being to prevent property val
an established county seat being injured by the locating
line of railroad a short distance therefrom; and this is s
plied recognition on the part of the framers of our co
tion of the great underlying truth that railroads, properl
ducted and under reasonable regulations, are a power fo
in the upbuilding of the material prosperity of a comm

In this state the power of the legislature over mur
streets is plenary, unless in exceptional cases not here pres
291 It has the power to devest the municipalities of all c
over their streets, and authorize their use by corporations
out compensation to the municipality. It is a question of
lative will and intent, not a question of power: City o
ridian v. Western Union Tel. Co., 72 Miss. 912, 18 Sout
29 L. R. A. 770; Dillon on Municipal Corporations, secs
683, 701; Smith on Municipal Corporations, sec. 1309.

With this principle clearly in view, looking now to the
of this case, and bearing in mind the needs of a railroa
its successful operation, the question next arises as to
rights a railroad acquires in its right of way, and, fu
whether there is any difference in the extent of these
where the right of way is over private property, or wh
traverses public streets or highways. It should be bor
mind that both railroad corporations and municipal co
tions are created solely by legislative authority, and are cl
in this connection, at least, only with such powers as a
pressly granted in the creative act which vitalizes and l
them into existence. By the grant to a railroad of a ri
way, whether that grant be made by legislative act over
lands or across public highways, or by condemnation pr
ings, donation or purchase through private property, c

rights in the use of its right of way are acquired by the railroad. It has the right to do all things with its right of way, within the scope of its charter powers, which may be found essential or incidental to its full and complete use for the purpose for which it was acquired. Thus it has been held that as a railroad cannot be successfully constructed or advantageously operated without establishing proper grades, so that trains may be safely and speedily transported over its tracks, the abutting owner has no claim for compensation for any earth that may be removed from the right of way, or for damages by establishing in a proper manner a grade thereon: New Orleans etc. R. R. Co. v. Brown, 64 Miss. 482, 1 South. 637; Cassidy v. Old Colony Ry. Co., 141 Mass. 174, 5 N. E. 142. It is also settled that as railroad companies cannot discharge the duties [292] incumbent upon them as public carriers of freight and passengers, and cannot transport the many trains required by the needs of commerce and travel with safety or security to life or property, without the maintenance of a telegraph system, they have the right to establish a system of wires and posts over their rights of way, and that this is not the imposition of an additional servitude, within the legal meaning of that term, authorizing an abutting owner to claim additional compensation: American Tel. & Tel. Co. v. Pearce, 71 Md. 541, 18 Atl. 910, 7 L. R. A. 200; Western Union Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159; Taggart v. Newport St. Ry. Co., 16 R. I. 688, 19 Atl. 326, 7 L. R. A. 205; Randolph on Eminent Domain, sec. 210. The basic principle here, as in the case of municipal control of highways, is essentially the same. Railroad companies are vested with power to devote the right of way to any purpose within the scope of the original condemnation or acquisition, and for the consequences flowing from such use the original owner is presumed by law to have been fully compensated. They may devote the right of way which they have acquired to any use indispensable to or which will facilitate the fulfillment of the objects of their corporate existence, whether these uses be by grading, constructing of telegraph lines, or other incidental uses requisite for the convenient, safe and successful conducting of their business and regular running of their trains. Does the use to which the Illinois Central Railroad Company desires to devote its right of way in the instant case fall within the category of incidental uses included within the original condemnation or acquisition, or is it a use foreign to its purpose and outside of its needs? It is hardly necessary

to state that as railroad trains are pulled by locomotive e
and as steam is the propelling power, fuel and water a
absolutely indispensable to their movement. As the pow
not be generated without heat, so water is required in o
bring into existence the required motive energy. If wate
is necessary, a railroad company [293] certainly has th
to purchase it, or procure it in any lawful method most
nient, whether by wells dug on its right of way, or by pu
from others: Hougan v. Milwaukee etc. Ry. Co., 35 Iow
14 Am. Rep. 502. This much being proven, it follows
mind, irresistibly, that it has the power to lay such c
as are required to bring the water from the source of su
the place of use. It can hardly be seriously contende
a railroad company clothed with power to grade its ri
way and to remove the earth therefrom, to lower or r
pleasure the surface of the ground, and to dig wells f
purpose of obtaining water, would not likewise have the
to dig thereon a trench and lay pipes for the purpose
veniently conveying the water needed to supply the
power. We think it manifest, therefore, that if the wate
in question was to be laid solely on that portion of the r
way of the railroad obtained by private conveyance o
demnation of private property, the railroad company wo
clearly within its rights in so installing it. And we are
to see that there is any distinction, based upon any soun
principle, in the power of a railroad company to mak
proper use of its right of way as the needs of its busine
demand, whether such right of way is acquired throug
vate property by donation, purchase or condemnation, or g
by legislative enactment over public property, streets or
ways. If it be necessary for a railroad company to co
a telegraph line, or raise or lower a grade where its ri
way runs through private property, the same conditions d
the same treatment when the right of way traverses str
highways. The broad, fundamental principle is: In th
struction or maintenance of its line of road, a railroad
pany is vested with all such powers as may be requisite
successful consummation of the object for which it was g
corporate existence. Take the instance of an interurba
of cable railway. Should a charter be granted by the s
such a corporation, which, from the [294] very nature
power by which the cars are run, requires that a trench
be dug, and a cable laid over its entire route, could it b

cessfully contended that the grant of a franchise would not carry with it, even without special provision, the power to perform such work and to dig such trenches as would be indispensable for the construction of its line of road? Clearly not; the reason being that the work is a mere incident to the completion of the purpose for which the charter was granted, and upon which the very existence of the corporation would depend. Just as a cable is indispensable for the running of such a road, so is water required to produce the propelling power used by steam railroads. The one is no more necessary to the successful operation of the first than is the latter indispensable to the other. This being so, and the lessor of the Illinois Central Railroad Company being expressly vested with all requisite powers, privileges and franchises, and these, in turn, by the broad and general provisions of its lease contract, being transferred to the Illinois Central Railroad Company, and the power of the legislature to grant the franchise being unquestioned, we see no escape from the conclusion that such railroad company is strictly within its rights in laying the proposed water main over its right of way, whether the same traverses private property, or crosses the public streets of a municipality, through which, by legislative enactment, its lessor acquired the right to construct and maintain its line of road. Especially where, as in the instant case, the right to so cross the streets was asserted and exercised by the railroad company long prior to any express legislative grant to the municipality of power to "regulate the crossings of railways," and such use has been acquiesced in and tacitly acknowledged by the municipal authorities and the citizens continuously and uninterruptedly for nearly half a century: See Smith on Municipal Corporations, sec. 1309e; Chicago v. Union etc. Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281. Under these circumstances, the fact that the Illinois Central Railroad Company is a foreign corporation [295] is of no importance. It is not compelled to resort to the power of eminent domain. It is but exercising a right already acquired by its lessor, and to which it has been expressly subrogated.

We do not here decide whether, under section 17 of our constitution, the construction across the streets of such water main would or would not entitle the abutting owners on the streets to recover compensation. That is not the case here. The municipality has no such title to the fee of the streets as entitles it to claim compensation from a railroad company or other

corporation which by virtue of a legislative franchise c
a portion of the public streets for crossing: City of M
v. Western Union Tel. Co., 72 Miss. 912, 18 South. 84
R. A. 770; Randolph on Eminent Domain, secs. 297-365;
v. Kerr, 27 N. Y. 188.

We recognize the well-established distinction betwee
of longitudinal occupancy of streets and cases where th
ways are simply crossed in the construction of the line
road, but that distinction, as we understand this record,
brought into question in this case. The only taking
streets of the city of Canton is by the crossing by the tr
the railroad, and this power, in our judgment, was ex
granted to the lessor of the Illinois Central Railroad Co
by any just interpretation of the various legislative acts
corporation hereinbefore referred to.

The remaining question in the case is of easy soluti
is a well-established principle of equity jurisprudence th
unauthorized occupancy of a street constitutes a nuisance
can by equity be enjoined or prohibited. But here t
no unauthorized occupancy of the public streets of the
Canton, and no proof that their free use will be perma
interfered with, or that any irreparable damage will be in
and hence there is no ground for the interposition of
straining hand of a court of equity: Faust v. Passeng
Co., 3 Phila. 166; Danville etc. R. R. Co. v. Common
73 Pa. St. 38. Under the facts of this record, all
sought by the Illinois [296] Central Railroad Company
temporary and partial obstruction of the streets for th
time required for the laying of the water main. This
the right to do, and this power is expressly recognize
general proposition as appertaining to all railroad corpo
by section 3555 of the Code of 1892. For all damages
mately resulting from such laying of the water main a
digging of the trench, the railroad company, by express
tory provision, would be responsible: Elliott on Road
Streets, secs. 809-882.

For these reasons, we are of the opinion that the bill c
plaint herein states no proper cause for injunction, and
the facts disclosed, the decree of the chancellor dissolvi
injunction was correct and is affirmed.

WHITFIELD, C. J., Concurring. The facts in th
necessary to the view I take are these: The Illinois C
Railroad Company, finding a more constant and ready

of water necessary to the convenient and efficient operation of its railroad as a common carrier, contracted with the Canton Cotton Warehouse Company for such supply. The said railroad company's water station was about seventeen hundred feet south of the Canton Cotton Warehouse and Ice Factory, and the railroad runs through Canton north and south. The railroad proposed to lay a subsurface water pipe, within the one hundred feet constituting its right of way, from the railroad's water station to a point opposite the ice factory, and from that point to lay pipes on the ice factory's grounds. The channel for the pipes was to be eighteen inches wide by two feet deep. Two of the streets of the city—Peace street and Fulton street—cross the railroad from east to west. Peace street is sixty feet wide, and Fulton street forty feet wide. The Canton Cotton Warehouse Company and Ice Factory and Water Plant is a private corporation. In other words, the waterworks plant does not belong to the city. It was, of course, necessary in [297] laying this water pipe to cross Peace and Fulton streets. The city filed this bill enjoining the laying of this pipe on the following grounds: 1. That the Illinois Central Railroad Company acquired the right of way, under its lease, through the charter of the New Orleans, Jackson and Great Northern Railroad Company, to the town of Canton (that is to say, to the southern boundary line of the corporation), and that the right of way north from the Canton corporation line was acquired under the charter of the Mississippi Central Railroad Company, which charter provided for a right of way northward from the city of Canton. The contention of the city on this point was that as the right of way under one charter was to the city line on the south, and under the other from the city line north, therefore the railroad had no right of way through the city. There are two answers to this: First. The third section of the charter of the New Orleans, Jackson and Great Northern Railroad Company, approved March 11, 1852, provides: "Sec. 3. Said company is hereby invested with all the rights and powers necessary for the construction, repair and maintenance of railroad through this state, and may purchase such land and material for the same as they may consider necessary." The charter of the Holly Springs Railroad Company, which was made part of the original Mississippi Central Railroad Company charter, which belonged to the consolidated company, the Chicago, St. Louis and New Orleans Company, provides in its eleventh section: "Whenever, in the construction of the said

railroad, it shall be necessary to cross or intersect any
lished road or way, it shall be the duty of said preside
directors so to construct said railroad across any road s
or hereafter to be established by law, so as not to imp
passage or transportation of persons or property thereo
when it shall be necessary to pass through land of an
vidual, it shall also be their duty to provide a proper
way across said railroad from one part of the land to an
The right of way through the state of Mississippi, [298] of
conferred the power to acquire the right of way throu
streets of any city in the state along the charter rout
all agree that there is nothing in this contention. The
ground for the bill was that the laying of this pipe un
surface of the streets was an additional servitude, wh
railroad company could not impose without the consent
city; but it is obvious, from the authorities cited in th
of counsel for appellee, that this, if so, could only be com
of by an abutting owner, and this bill is filed by t
alone. The rights of no abutting owner are involved here
third ground for the bill was that there was a corrupt
ment between the Canton Cotton Warehouse Company a
railroad to use the railroad's right of way for a
purpose—that is, to enable the Canton Warehouse Com
sell its water in disregard, as alleged, of the police po
the city over its streets. And complaint is made ab
rate at which the water is sold. But the chief grou
sented in the argument here was that the railroad co
could not cross with its right of way these two streets
the consent of the city, nor lay said water pipes wit
right of way without said consent. So far as the right
is concerned, we have already pointed out that the le
the Illinois Central Railroad Company was granted the r
way through and across these streets by charter given
legislature. Having obtained legislative grant, it was u
sary to get consent from the city, since the legislative p
that respect is paramount. And secondly, if there ha
no legislative grant, there had been forty years' occupati
use of the right of way across these streets, and that co
a valid prescriptive right: Louisville v. Louisville Wat
105 Ky. 754, 49 S. W. 766, cited in the exhaustive note t
v. Hutchinson W. L. & P. Co., 61 L. R. A. 76.

The only real question in this case for decision is th
the grant of the right of way, or the acquisition of th

y by forty years' use, confer upon the railroad the right
e water pipes set out in the testimony, under the
rming part of the right of way, where the pipes would
the streets in question, of the city of Canton? The
is based upon the proposition that to permit the rail-
ig up the surface of these two streets crossed trans-
the railroad right of way, so as to lay these pipes un-
l, beneath the surface of the streets, is an interfer-
the use of these streets as streets. It is, of course,
the city of Canton has full power to control its streets
use by reasonable police regulations. Power of cities
gard is very large. On the other hand, the railroad
has a right of way over these streets, and the grant
ght of way must carry with it every such use of the
of the right of way as will reasonably facilitate the
peration of the railroad, which use does not also in-
th the use of the streets by the city as streets for the
ver them by persons riding, driving or walking, or
es not interfere with their use as streets for other
rposes, and which use does not also interfere with
rty rights of abutting owners: See the authorities col-
ote to Asher v. Hutchinson etc., 61 L. R. A. 77, 78.
are some principles which are, of course, plain: 1.
city has the amplest power to control its streets for
of all its citizens. 2. That the only party who can
amages of the railroad for putting an additional servi-
hese rights of way is the abutting owner: See author-
rief of counsel for appellee. The city has no right to
in such case. 3. That the railroad grant of right of
the streets of the city does not authorize it to inter-
n any manner interfere with the use of the streets
They may construct any necessary and proper build-
heir right of way: Gudger v. Richmond etc. R. R.
N. C. 581, 11 S. E. 515, 43 Am. & Eng. R. R. [300] Cas.
note. But whether they can lay pipes underneath the
f streets is not, of course, determined by their right
uildings on their right of way, where their right of
not cross streets. 4. But it is also clear that what-
of the ground beneath the surface of the streets, es-
the efficient operation of the railway, may be fairly
within the grant of the right of way itself, as inci-
eto, is a use to which the railroad company has a
ake the concrete case. What the railroad wants is

water. Railroad trains cannot be operated without water. procurement of water in abundant supply is essential, highest degree, to the efficient operation of the railroad. pipes which are to conduct this water from the property Canton Cotton Warehouse to the railroad water tanks a posed to be put deep beneath the surface of the streets, the railroad right of way crosses them, and the surface streets is to be put back in the same condition in whic now, so that passage over the streets, as streets, will not any manner interfered with. It is true that for the littl required to dig up the surface of the two streets and l pipes thereunder—shown to be only a few hours—there be some slight, temporary, interference with travel ov streets; but it is not this sort of casual, necessary interf which the law means, within the principle which we are d ing. Such casual, necessary interference, in the prosecut improvements, may often occur in the adjustment of th tive rights of cities and railroads passing over their street are not to be held by the courts as an insuperable bar the development of the manifold needs of the complex ci tion of a city, when the relative rights of a city and of co carriers traversing its streets are involved. The city c duty to the railroad, and the railroad a duty to the city. must so use its rights as not needlessly to interfere wi exercise by the other of its rights. The city may and keep its streets open for travel; but, in doing so, it is 301 stickle at a slight interference for a few hours wit use, when that interference is necessary to enable the r to properly exercise its right, incidental to the right of w lay subsurface pipes for the conveying of so essential a th water.

As said in Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec "The right of the public in the use of a highway is the ri transit to every person who has occasion to use it. This is, however, subject to such incidental and temporary c tial obstructions as manifest necessity may require. Ev use of a highway for mere transit by one part of the may, at the time of a multitude upon it, oppose a tem obstruction to the passage of another part of the publ company of persons stopping and standing on the pavem a street, or persons stopping in the street with their wag carriages, for mere temporary purposes of business, int impediments to the free and uninterrupted transit upon

ay. The delivery of freight and every variety of
l, etc., at business and other houses on a street, is a
incident to the use of the public highway. And the
improvement of streets, and the deposit of the ma-
the same, often create obstructions to the unin-
transit by the public. So, also, the improvement or
r repair of houses and the construction of sewers and
ns on adjacent lots often create necessary temporary
ts upon public highways. These are not invasions
mply incidents to, or rather qualifications of, the
ansit, and the limitation upon them is that they must
nnecessarily and unreasonably interposed or pro-
See, also, Kirby v. Citizens' Ry. Co., 48 Md. 168, 30
455.

lroad undertaking to lay such subsurface pipes trans-
d underneath the surface of streets must exercise
and skill and great dispatch in doing so, so as to
interference with the use of the surface of the streets
nd as slight as possible. But to hold that, [302] exer-
h care, and reducing the interference to the mini-
hown in this record, it may not use this right at all,
has as an incident to its right of way, already law-
ired, is to place one's self in the city's point of view
nd omit to see the correlative right of the railroad.
of the streets must be preserved, of course, but the
on of the use of the streets as streets cannot in any
sense be said to be interfered with by the construc-
e subsurface pipes in the manner indicated by the
in this record. The principle is thus announced in
nd Co. v. South etc. Ry. Co., 95 Ala. 631, 10 South.
e authorities support the conclusion that a railroad
may make any use of the land acquired by it for use
ht of way for its railroad which directly or indirectly
s to the safe, economical and efficient operation of
and which does not interfere with the rights of prop-
ining to the adjacent lands." And again at page 273
says: "It is a matter of common knowledge that the
usiness involves the use not only of cars and tracks,
ildings and structures of various kinds. It was con-
that the strip of land in dispute in this case should
a right of way in a city. The place was expected to
ne for the transaction of many phases of the busi-
rent from, but incident to, the mere act of carrying

persons or things. It was to be the place for receiving,
ering, storing and transshipping freight. In such place
frequently necessary for the convenient transaction of a
road business to have platforms, warehouses, lumber-yard
vators, cattle-pens, engine-houses, carsheds, depots, repair-
and other like facilities contiguous to the tracks. The
which is commonly called the 'railroad right of way' is, in
lous localities, generally found dotted with structures,
than the tracks which are necessary or convenient fo
transaction of the business of a common carrier; and we
that the erection of such structures is to be regarded as
303 the contemplation of the parties to a contract which
lates for the use of land in such a locality as a railroad ri
way, unless the contrary appears from the terms of the
tract. Ordinarily the right of way of a railroad company
exclusive property, and the company is entitled to its fre
unobstructed use: Memphis etc. Ry. Co. v. Womack, 84
149, 4 South. 618. The company is entitled to an ab
and exclusive possession so far as to secure fully every p
for which the railroad is made and used: Tennessee et
Co. v. East Alabama Ry. Co., 75 Ala. 524, 51 Am. Rep
The question is, What are the uses to which the right o
may be devoted? The Western Railroad Corporation w
thorized by its charter to lay out its road, not exceedin
rods wide, through the whole length, and to acquire such
by condemnation proceedings. In reference to the rig
the company within this area, Shaw, C. J., delivering the
ion of the supreme court of Massachusetts, said: 'To t
tent of five rods, it appears to us, the legislature intende
the franchise of this corporation should extend, for any a
purposes incident to the object of its creation. It wa
tended in argument that their franchise for public pu
extended only to the use of this strip of land as a way, an
if they had occasion for buildings and storehouses, as in
to their operations as carriers of persons and merchandise
were to be regarded, in their latter capacity, as carrying
distinct business for their own profit, and therefore that
buildings were not to come under the same franchise. B
such limitation is contained in the act of incorporatio
none such results from the nature of its provisions. T
tablishment of the rail track and the maintenance of e
and cars for the transportation of persons and goods are al
bined together, as one public object to be attained, and the

dent to the other. No doubt, in practice, the main
e strip of land of five rods in width, in the greater
extent, will be for sustaining the track for the trains
ss over. But such restriction of its use is not found
t, and therefore, when the corporation have occasion
part of such strip of five rods for any of the purposes
o their creation, it is within their franchise.'" To
effect, see note to Gugden v. Richmond Ry. Co., 43
ng. R. R. Cas. 608. See specially, also, Allen v. Bos-
Mass. 335, 38 Am. St. Rep. 423, 34 N. E. 519. And
Walker v. Pierce, 38 Vt. 97; Abbott v. Butler, 59
.

s a marked distinction between the rights to lay pipes
gas, and the like, in a country highway, and in the
a city. The laying of water mains is not an inci-
ne use of a country highway: Elliott on Roads and
c. 404. But even there Judge Elliott says (page
the light is for the highway and it is necessary to
fe and convenient for free passage, then it is probable
ighway officers would have a right to dig trenches and
for we think it must be the law that where it is neces-
cure gas to light the public way, and thereby make it
ighway officers may use the way for a pipe line. To
meaning plain, suppose, for example, there is a dan-
dge or other place in a rural highway much traveled
ht, and that the best and most convenient mode of
nd making it safe is by conveying gas to it, from a
rby; would not the highway officers have a right to
es and lay pipes in the road for the purpose of light-
angerous place, and thus make it safe for passage?
inds it seems clear that they would have this right."
aying of pipes for the water or gas is an incident of
the streets in a city. Says Judge Elliott in section
e streets of a city may be used for laying pipe lines,
s so although there may be no express statutory pro-
thorizing the municipality to permit such a use.
municipal corporation has power to light its streets
ply itself with water, it has, as an incidental power,
rity to permit [305] the necessary pipe lines to be laid
blic streets. But a gas or water company has no right
o the streets of a city without the consent of its offi-
pt, perhaps, in cases where the charter of the com-
ers that right. Laying water or gas pipes in a street

is not an additional burden entitling the owner of the
additional compensation. Reservoirs and cisterns may b
in city streets. Sewers and drains may be constructed ir
lic streets when required for corporate purposes." Pr
the same doctrine is laid down by Judge Dillon in Dillon'
nicipal Corporations, volume 2, section 697.

The best statement we have seen of the extent of the ri
easement in a city of a street is contained in section 4
Elliott on Roads and Streets: "Some of the courts make
tinction between cases in which the fee is in the munici
and those in which it is in the adjoining owner, but, i
judgment, there is, so far, at least, as respects the subject
immediate discussion, no valid reason for the distinctior
declared to exist. The easement which the municipal co
tion acquires is broad enough to authorize the corporate c
to make any legitimate use of the streets which does not i
its character as a public way or interfere with its free ar
obstructed use. The owner who dedicates ground for a
creates an easement extensive enough to permit the city to
any legitimate public use of it which does not impair the
of passage or the right of ingress and egress to and fro
joining property. So, when the land is taken under the
of eminent domain, all is taken that is necessary to mal
street a public way in all that the term implies. The eas
acquired is by no means confined to the right of pass
travel, for it is a matter of common knowledge, and the
of law, that land acquired for a public easement is subject
the burdens incident to that easement." To the same ef
15 American and English Encyclopedia of Law, second e
497, section 5: "As stated above, the municipality ha
erally no right to place obstructions of a permanent cha
on a highway for municipal purposes, [306] but tempora
structions may be permitted for such purposes when appa
necessary or desirable; and it has even been held that th
nicipality may occupy a part of the highway with a wate
or reservoir to hold water for the purpose of sprinkling st
So much for the extent of the use of the easement of a
As to the extent to which an abutting owner may use th
ment in the street, it is said in the authority just cited, o
497, section 6: "It is conceded that owners of property
ting on the highway may make certain uses of a part
highway which are necessary for the proper utilization a
joyment of the property. These rights of the abutting

pally those of leaving building materials and acces-
the highway, and also of leaving therein, for a rea-
me, articles about to be moved from or into a build-
pparatus or vehicles for the purpose of aiding in such
nd a wagon may be placed on the sidewalk for this
The obstruction by the abutting owner must, however,
asonably necessary character, and it must not unrea-
terfere with the rights of the public to use the high-
ne same authority states in note 5 on the same page:
d company improving land adjoining a highway for
urposes has the same rights as an abutting owner to
part of the highway for the purpose of construction
he same authority, on page 500, paragraph "h,"
he unauthorized making in or near the highway of
tion which is calculated to interfere with travel con-
obstruction and nuisance, subjecting the maker to
damages in case any person is injured thereby, un-
ecessarily made in the improvement of abutting prop-
hich case it must not be unnecessarily extended or
and must be properly guarded to prevent accidents."
ge 491, paragraph 14, it states: "While highways are
designed for the purpose of travel, and must there-
pt clear of obstructions, the law justifies obstructions
l and temporary character [307] from the necessity of
and for the convenience of mankind, when those ob-
occur in the customary or contemplated use of the
they being reasonably necessary and not unduly pro-
As to what is a proper obstruction, as being based on
ble and necessary use, it is impossible to lay down
l rule, each case being determinable by the particular
nces thereof." To the same effect, see Allen v. Bos-
Mass. 335, 38 Am. St. Rep. 423, 34 N. E. 519. In
can and English Railroad Cases, 576, in a note to
Lumber Co. v. Harris, the supreme court of Kansas
as saying in Kansas Cent. Ry. Co. v. Allen, 22 Kan.
m. Rep. 190: "An easement merely gives a railroad
right of way in the land—that is, the right to use
for its purposes. This includes the right to employ
taken for the purposes of constructing, maintaining
ting a railroad thereon. Under this right the com-
the free and perfect use of the surface of the land as
essary for all its purposes, and the right to use as
e and below the surface as may be needed."

Now, what is the principle underlying the right of th
to lay pipes in the streets for water and gas for the
good, and the right of the abutting owner likewise to
excavations under the streets wherein to lay pipes for s
or water? Manifestly, the principle is that land ded
for a street is not limited as a highway to the one purp
passage over its surface by pedestrians, vehicles, stree
etc., but that the easement of streets is so extensive as to p
any other use by the city or by the abutting owner which
not interfere with the use of the street as a highway for t
It may be conceded that the primary use of a street is t
may be used for travel over its surface, but that in no wa
terferes with the sweep of the principle that it may al
used for any other purpose not foreign to its use as a hig
which does not materially interfere with such use of it
308 highway. It is impossible to conjecture at the time o
dedicating of any given street in a city how varied and
numerous may be the other uses referred to, demanded b
complex needs of an advancing civilization in city life.
on this same principle, precisely, the railroad in this c
entitled to passage over the surface of the streets, and t
other use—subsurface or supersurface—of the land emb
in its right of way which contributes essentially to the ef
operation of its road as a carrier of freight and passengers
vided only that such other use does not interfere with th
of the streets as streets.

It is said that the Illinois Central Railroad Compa
but the lessee of the railroad which constructs these ra
crossings over the streets of Canton, and authorities are
announcing the familiar principle that ordinarily in such
the lessee company cannot exercise the right of eminent do
itself, because it does not belong to it by the lease; but
authorities have no application whatever here, for the
obvious reason that the lessor railroad company acquire
right of way itself in the exercise of the right of emine
main, and the right of way the lessor railroad acquir
course, passed, in the full extent it had it when so acq
to the lessee. The appellee is not claiming the right to
cise the right of eminent domain in laying these pipes.
cisely what it claims—and nothing more—is that the rig
way acquired by its lessor, and which passed by the lease
embraced, as a necessary incident, the right to lay these
Appellee insists that the lessor railroad company could

pipes, as being necessary to the convenient and effi-
ration of its railway, and that by its lease it got that
s already existing in the lessor. In other words, as
e outset, the crucial test is, What exactly is embraced,
facts of this case, in the right of way which the lessor
of course, conveyed to the lessee? Cannot it be
d that the laying of these pipes within the right of
original acquired by the lessor materially facilitates
ently aids the operation of the railroad company as a
nd passenger carrier? If so, then it was an incident
ght of way. The railroad is interfering in no proper
h any existing use of these streets. If in time the
d need to put pipes for water or gas or sewage under
e streets at these points, when that time arrives there
readjustment to suit the needs of the changed condi-
o such situation is presented by this record.

e already adverted to the fact that no abutting owner
omplaining upon the ground that a new servitude is
posed by the railroad company on the right of way.
butting owner should complain, and if he should show
laying of these pipes is the imposition of a new servi-
of course, could recover such damages as may be oc-
to him thereby, but that is not our case.

e paid no attention to the charge of collusion between
ad and the cotton warehouse, for it must be obvious
he railroad had the legal right to lay these pipes, the
them could not be rendered illegal because of any
agreement between it and the cotton warehouse that
ad should lay them. What it is legal to do cannot
ed illegal because of a foolish collusive agreement to

l consideration of the case leads us to the conclusion
action of the learned chancellor is correct, and the
affirmed.

tice Calhoon Dissented, and said in part that: "If we
sider, as we should (and as my associates must agree that
), the municipal chapter of the code as of force, or as be-
laration of the public policy of the state, and as a recog-
the common law of all time applicable to the subjects now
then there is another serious feature of this record to be
to. In this view, the opinion of the majority of the court,
lgment, is a judicial repeal of the spirit and letter of im-
ndependent clauses of five sections of Code of 1892—viz.,
933, 2947, 2948 and 2974. The record shows that these sec-

tions were adopted by ordinance of the city long before thi
tion arose. Section 2947 gives the municipal boards 'full
tion in the matter of streets,' etc. Section 2931 empowers
'regulate the construction and passage of railways and str
roads through the streets,' etc. Section 2933 empowers t
grant to any person or corporation the use of the streets,'
lay gas, water, sewer, or steam pipes, etc., to be used in fu
. . . . any person or corporation with water,' etc. Section 2
powers them to 'prescribe the rates for the sale of water.'
2974 empowers them 'to regulate the crossing of railways . .
provide precautions and prescribe rules regulating the san
'Full jurisdiction' means 'exclusive jurisdiction,' as has l
peatedly held by this court, and so held as to section 2947
case of Blocker v. State, 72 Miss. 723, 18 South. 388. As
gathered from what has been said, I favor the doctrine c
construction of charters, and I stand opposed to the exe
doubtful powers. But on the most liberal construction of
under the charter of the railroad now sought to be exercise
lessee which claims to be a foreign railroad corporation, i
certain that it cannot exercise them except according to l
it seems certain that it cannot exercise them in palpable viol
law. Surely it cannot dig through three streets at right
without calling on the city 'to provide precautions' in the
the language of section 2974 of the Code of 1892. The city
ment, with 'full jurisdiction' over streets, with exclusive
tion to 'regulate the construction and passage of railways
the streets,' with exclusive jurisdiction to grant the power
'person or corporation' to 'use the streets to lay water pipe
exclusive jurisdiction to 'prescribe the rates' for the sale
(Code 1892, sec. 2948), with exclusive jurisdiction to 'prov
cautions' in the crossing of streets by railways, is entitled
cree in this cause. The city must be consulted by 'any p
corporation,' under Code of 1892, section 2933, whether clai
right under charter or not, before laying water pipes in th
This is reasonable, and none ought to contend that a charte
may be exercised unreasonably and independently of the pr
law of supervision as set forth in that section. All those pr
are simply enactments of the common law universally re
by the authorities and text-books relating to the subject. Fr
are granted by legislatures to their immediate creatures,
not be leased to either foreign or domestic corporations ex
express authority. In the act authorizing the lease of the
Central Railroad Company (Laws 1882, pp. 1023, 1024, c. 559
there is absolutely no such authority given as is here clai
seems to have been carefully omitted. Under it the 'railro
may be leased. So well did the great lawyers who represen
foreign corporation understand this that they provided in t

e of the four hundred years' lease itself that the lease was
ed things—viz., 'all and singular the railroad of the party
st part, extending,' etc. (describing it), 'and also the lands,
ts, rock quarries, rights of way, depot buildings, and depot
station-houses and station grounds, water tanks, machine-
orkshops, stationary engines, machinery and fixtures, en-
es, warehouses, offices, and all other buildings, structures,
ovements of any nature and kind whatsoever.' And so well
lawyers comprehend that they were on a 'shaking prairie'
provided in the second clause of the lease that the Chicago,
and New Orleans Railroad Company, the immediate lessor,
aintain its corporate organization and existence by the an-
ion of directors and officers, and the performance of such
s as may be required by law for that purpose, and that it
ny time during the said term [four hundred years], when
by the said party of the second part [the appellee], its
or assigns, exercise every corporate power, and do every
act which the party of the first part [the lessor] can law-
rcise or do,' etc. So there was no authority in law to lease
chise, and in fact no franchise, but only specified things,
the contract of lease; and there can be no warrant for
and palpable fraud here attempted by a foreign corpora-
ur constitution (sections 179-190) by the attempted exer-
etended rights in flagrant violation of law, and never sought
rcised for fifty years by its predecessors or by any other
company on earth at any time. In the exercise of these
ights, it may, under the decision in this case, as my brethren
it, at any time, rip up the vitrified brick pavement in the
ty of the state, and lay water-pipes under it, to do what?
get necessary water, but to get water cheaper than any
t of Jackson can get it. I respectfully repudiate this,
especially, if further emphasis were needed, when the rec-
stakably shows that this foreign corporation relies abso-
an agreement with a private corporation of this state,
on Cotton Warehouse Company, to enable it to do what
house company could not do, and for the execution of which
company might be dealt with by the city. If illegal in
house company to lay the pipes to furnish the water, the
t is clearly illegal as to both parties to it. There is no
here of the rights of abutting owners, to which appellees
o confine this case. It is a question of governmental police
hich cannot be bargained away and which 'shall never be
': Const., sec. 190. If any right exists in any railroad cor-
which I deny, to commit the inexcusable outrage attempted
the Illinois Central Railroad Company, it could be claimed
its lessor, the Chicago, St. Louis and New Orleans Com-
ich is not even a party to this litigation. This alone is fatal

to the claim of the Illinois Central Railroad Company: 19
Eng. Ency. of Law, 899, and note; Englewood v. Chicago et
Co., 117 Ill. 611, 6 N. E. 684; Dietrichs v. Lincoln etc. Co.,
361, 13 N. W. 624; Gottschalk v. Lincoln etc. Co., 14 Neb.
N. W. 695; Kip v. New York, 67 N. Y. 227; 1 Elliott on R
sec. 37; 1 Rorer on Railroads, p. 36. Even 'the right to pl
upon a road or street, and use it in the operation of a railr
only be granted expressly or by necessary implication, and
must be reasonable, and such as was clearly contemplated':
on Railroads, sec. 1076, and the authorities it cites in note 1,
In Edmonds v. Baltimore etc., 114 U. S. 461, 5 Sup. Ct. Re
29 L. ed. 216, it is said: 'It is not known to any member of t
that any railroad company has ever claimed to use the st
an incorporated city, or any part of them, without express a
from some one legislative body.' Where is any express auth
this record? Nowhere.

"To my mind it is manifest: 1. That the New Orleans,
and Great Northern Railroad Company, if it were now o
this road, could not, under its charter of 1852, containing th
relied on, do the act sought to be done here. Repeating that
reads as follows: 'That said company are hereby invested
rights and powers necessary for the construction, repair an
tenance of said railroad through this state.' Is it reaso
suppose that the legislature, in the language used, even if
used now at this date, had any contemplation of conferrin
to undermine the streets of a city? Water mains for the
water were unknown here in 1852. 2. If the power exists
only be exercised when necessary, and it is not necessary u
facts of this case. If not regarded necessary for fifty ye
is it so now? 3. If necessary now, it is still the exercise of
chise which cannot be availed of by the lessee, and the less
a party. The act of 1882 does not authorize the lease of a
chise. 4. The warehouse company being without power,
road company will not be allowed to combine with it to e
law."

A Railroad Company has the right to occupy any portio
right of way when necessary for railroad purposes. Occu
its right of way by a railroad corporation for the purpo
water tank, when necessary, is proper, and the owner of
cannot object thereto: Railroad v. French, 100 Tenn. 209,
St. Rep. 752. And a railroad company has a right to dig a
its right of way, and use the water for railway purposes:
v. Milwaukee etc. R. R. Co., 35 Iowa, 558, 14 Am. Rep. 50

MARX v. JORDAN.

[84 Miss. 334, 36 South. 386.]

DEEDS—Record of as Notice.—If the name of one person is inserted in a deed as the grantor, but it is signed, acknowledged and delivered by another person not mentioned in the body of the deed, the record thereof is not constructive notice to a subsequent purchaser that it is the deed of the person who signed it. (p. 458.)

E. S., J. T. and H. W. M. Drake, for the appellants.

C. A. French, for the appellee.

336 WHITFIELD, C. J. In the alleged trust deed to M. Levy, trustee for the benefit of Henry Marx & Sons, of date March 3, 1902, the granting clause of the deed expressly names as the sole grantors Frank Bowie and Frances Bowie. In the reciting part of the trust deed it is stated that they are indebted in the sum of one hundred and thirty-nine dollars and seventy cents, "evidenced by their note." At the conclusion of the trust deed it is recited that, "In testimony whereof the said party of the first part set their hands," etc., in the plural.

From this simple statement of the exact instrument before us, several things are evident.

1. This is not the case of a deed in which the grantors are not named. Both grantors are expressly named in the reciting part of the instrument, and in the granting clause of the instrument, and in the conclusion of the instrument; "said party of the first part," in the last, meaning, of course, the previously recited grantors, Frank Bowie and Frances Bowie.

337 2. This is not the case of a wife seeking to convey her separate estate, in which the husband's name does not appear as grantor, but in which his name is signed to the deed, and his acknowledgment duly taken; nor one in which the husband, though not named as grantor, and not having signed the deed in the proper place for signature together with the wife, declares after the signature of the wife in writing, "that he hereby consents to the above obligation of his wife," and signs that and acknowledges it, as was the case in the cases of Stone v. Montgomery, 35 Miss. 83, and Armstrong v. Stovall, 26 Miss. 275. It may just as well be noted, besides, that in these two cases the court seems to have proceeded quite as much

upon the idea that the husband would be estopped, l
he had done, to deny that he had consented, as upon t
that what he did amounted originally to an execution
deed.

3. This is not the case in which the scrivener inte
write the name of a particular party (David Bowi
wrote his name wrong. There is no mistake of that so
It is perfectly plain that the scrivener meant to write
Bowie" and "Frances Bowie," and to write them as the
of those two persons, and that he did not intend to w
name of David Bowie in the deed at all. He manifest
posed that Frank Bowie and Frances Bowie were the g
to be bound, and he wrote that intention plainly and
down. It may be quite true that he made a mistake
posing Frank Bowie and Frances Bowie were to be the
ors; but that mistake cannot convert an instrument
declaring that Frank Bowie and Frances Bowie execu
instrument, and that they alone executed it as grantors,
instrument made by a party who was not recited as a
in it, who clearly was not intended to be a grantor in
who, in some curious way, signed and acknowledged it
deed is, and must be—that is, the deed before us, with
ticular recitals—the deed of the parties who are expres
clared [338] to be the grantors, who expressly granted the
conveyed, and who alone anywhere in it appear to hav
intended as grantors.

4. And, finally, this is the case of a deed in which,
fore, the grantors are expressly recited in it. Said g
expressly conveyed by a deed effectual only as against
Is it possible that the fact that David Bowie signed
deed, effectual only for such a purpose, and acknowled
can make such a deed his deed? Manifestly not. Th
mony in the case shows that Frank and Frances Bow
husband and wife, and that David Bowie was their son.
not, therefore, a case of mistaken identity on the part
scrivener. He wrote exactly what he meant to writ
wrote a deed which could only bind the parties expressly
therein as grantors: See the authorities collected in 1
on Deeds, secs. 194-206. See, also, the Alabama cases
in the brief of counsel for appellee.

The precise question presented for adjudication h
Did this alleged trust deed to Henry Marx & Sons, havin
recorded, impart notice to third parties? Was the a

notified by the record of such an instrument that it was the deed of David Bowie? We are clearly of the opinion that no such notice was imparted.

Affirmed.

The Signing of a Conveyance by one not described therein as grantor is said to be wholly inoperative. At most it manifests the consent of such signer that another party described in the conveyance as a grantor may execute it: Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65. See, too, the note to Payne v. Parker, 25 Am. Dec. 226.

The Effect of the Defective Recording of legal instruments upon the rights of third persons is discussed in the monographic note to Koch v. West, 96 Am. St. Rep. 397-406. See, too, the recent cases of Agurs v. Belcher, 111 La. 378, 100 Am. St. Rep. 485; Roberson v. The Downing Co., 120 Ga. 833, 102 Am. St. Rep. 128.

HARTZOG v. WESTERN UNION TELEGRAPH CO.

[84 Miss. 448, 36 South. 539.]

TELEGRAPH COMPANIES—Claim for Damages—Time for Filing.—A stipulation in a contract for the transmission of a telegram, that the telegraph company will not be liable for damages in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, is valid and binding. (p. 459.)

K. McInnis, G. B. Power and Alexander & Alexander, for the appellant.

Harris & Powell, for the appellee.

450 CALHOON, J. A stipulation in the contract for the transmission of a telegram, that the company would not be liable for damages "in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," is valid and binding. This is precisely so decided in Clement v. Western Union Tel. Co., 77 Miss. 747, 27 South. 603, which is in keeping with the decisions of this court in kindred matters of contract limitations as to express companies; in Southern Express Co. v. Hunnicutt, 54 Miss. 566, 28 Am. Rep. 385; and, as to life insurance companies, in Universal Life Ins. Co. v. Whitehead, 58 Miss. 226, 38 Am. Rep. 322; and in Bonner v. Mutual Life Ins. Co. (this day delivered), 36 South. 538. Our conclusion makes it unnecessary to

give our views of the instructions or as to whether the
the record before us warrant punitive damages.

Affirmed.

A Stipulation in a Contract Between a Telegraph Company
sender of a message that the company shall not be liable for
in any case if the claim is not presented in writing with
days after the message is filed is, according to the better
invalid: Davis v. Western Union Tel. Co., 107 Ky. 527, 92
Rep. 371, and cases cited in the cross-reference note there

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

HIGGINBOTHAM v. McGREADY.

[183 Mo. 96, 81 S. W. 883.]

GAMBLING—Note Enforceable by Bona Fide Holder.—A statute declaring that notes the consideration of which is money won at gambling are void though assigned does not render unenforceable, by a bona fide holder, a note that was given to take up checks, which had been drawn by the maker of the note to obtain money to continue in a poker game with the payee and others. (p. 469.)

GAMBLING—Notes—Constitutional Law.—Where one section of a statute declares that notes the consideration whereof is money won at gambling are void, another section declaring that the assignment of such notes shall not affect the defense of the makers is not unconstitutional as abridging any right of private contract. (p. 470.)

James F. Green, William S. Anthony and C. H. Richeson, for the appellant.

E. M. Dearing and Dinning & Hamel, for the respondent.

98 ROBINSON, J. This is an action by the plaintiff, indorsee of a promissory note for five hundred dollars, against defendant, the maker thereof. By answer, the defendant interposed the following as his defense to plaintiff's action:

"That the sole and only consideration moving to the execution of the note in plaintiff's petition described was money lost by this defendant at a game of chance, commonly called poker, played by means of a gambling device, to wit, a pack of cards, which said game was played on the day and on the day before the execution of said note, to wit, January 22, 1900, at the 99 city of De Soto, Jefferson county, Missouri. Defendant further avers that at the said game of poker at which defendant

lost the money for which said note was executed, he [defen
and D. Ballard, the payee of said note, together with c
played at said game of chance, and that said money wa
by the said D. Ballard and the other parties who played a
game of chance; that for the said money so won by the sa
Ballard and the other parties who played at said game of ch
defendant executed to the said Ballard the note sued on he

"Further answering plaintiff's petition, defendant denies
and every allegation therein contained, not in this answe
pressly admitted.

"Wherefore, the premises considered, the defendant aver
the said note is void and of no effect in law."

To this answer the plaintiff filed the following reply:

"Now comes the plaintiff in the above-entitled cause an
replication to the answer of the defendant in the above-en
cause denies each and every allegation of new matter in
answer contained.

"Further replying to said answer, plaintiff says that the
sued on in this case was assigned, transferred and delive
this plaintiff for value before the maturity of said n
averred in plaintiff's petition and that plaintiff was the l
of said note, for value without any notice as to the cons
tion of said note. And plaintiff avers that, if it were
(which plaintiff denies) that said note was given for a gam
transaction, as averred in defendant's answer, the pla
being a holder for value of said note before the maturity
of, is entitled to recover the value thereof, and the pl
avers that section 3427 of the Revised Statutes of 1899,
far as said statute authorizes such defense of want of cons
tion as against this plaintiff, is a violation of section
100 article 2 of the constitution of the state of Missouri i
the same impairs the obligation of the contract betwe
payee of said note and this plaintiff, and further that sai
tion of the statute is violative of section 1 of article
amendments to constitution of the United States, and of s
10, article 1 of the constitution of the United States.

"And having fully replied, plaintiff prays judgment as
petition heretofore prayed."

At the conclusion of the testimony, the plaintiff aske
court to give to the jury the following instructions:

"1. The court instructs the jury that if you find fro
evidence that defendant executed the note sued on and del
the same to D. Ballard for money loaned defendant by s

Ballard, and that said D. Ballard for value transferred said note to plaintiff before the note became due, and that the note has not been paid, then you will find the issues for the plaintiff for the amount due on the note, although you may further find that defendant borrowed said money and used it afterward for gambling purposes.

"2. The court instructs the jury that if you find from the evidence that plaintiff purchased the note sued on and paid value for it before its maturity and that he so purchased it without any knowledge that it was given to Ballard for money lost at a poker game, then you will find the issues for the plaintiff, although you may further find the note was given for a gambling debt, as section 3427 of the Revised Statutes of Missouri 1899, is unconstitutional and void in such cases."

These instructions the court refused, and at the instance of defendant, instructed the jury that under the pleadings and evidence plaintiff was not entitled to recover, and directed a verdict for defendant. In due time the plaintiff filed his motion for a new trial, the overruling of which led to the prosecution of his appeal, [101] and the case was sent to this court on account of the constitutional question raised.

As the case was disposed of by peremptory instruction of the trial court directing the jury to return a verdict for the defendant, it will become necessary only to briefly outline the testimony given by plaintiff and one of his witnesses, which was to the effect that plaintiff was an innocent purchaser for the value of the note in suit from the payee thereof before its maturity; that plaintiff had no information or knowledge whatever before or at the time he purchased the note that it had been given on account of a gambling debt, or that it was made as the result of money won or lost at any game or gambling device. By way of rebuttal the plaintiff called as a witness the original payee of the note, Dave Ballard, and since upon his testimony the result of this appeal will be determined, we have thought best to present that testimony in the precise language of the witness, as follows:

"Q. Your name is Dave Ballard? A. Yes, sir.

"Q. You live in De Soto? A. Yes, sir.

"Q. I show you a note, Mr. Ballard, made payable to you, signed by F. E. McGready, dated January 22, 1900, for five hundred dollars, payable to you or bearer and by you indorsed to Judge Higginbotham, the plaintiff, and ask you if that note was delivered to you by Mr. McGready? A. Yes, sir.

"Q. That was for money you had given Mr. McGrea his checks? A. Yes, sir.

"Q. How much? A. Six hundred dollars.

"Q. What was it furnished in? A. Cash.

"Q. You loaned him six hundred dollars? A. Ye

"Q. This note was given for six hundred dollars? A. sir.

"Q. Did you say you loaned him any money? A. Ye I loaned him six hundred dollars.

"Q. Did you loan it all at one time? A. No, sir.

102 "Q. How much at a time? A. I loaned him dollars and he gave me a check signed by F. E. McGre Son, and then he took that up. He gave me five hundre lars worth of them that night.

"Q. You say you took up five one hundred dollar c A. Well, some of them might have been for fifty dollar he took up checks to the amount of five hundred dollars a I got cashed at the bank for one hundred dollars.

"Q. You mean to say you loaned him six hundred d A. Yes, sir.

"Q. He gave you a check signed F. E. McGready & A. Yes.

"Q. Is that a firm doing business? A. Yes, sir.

"Q. These checks that he gave you, you furnished money for? A. Yes, sir.

"Q. Cash? A. Yes, sir."

Cross-examination by Judge Dinning.

"Q. You say, Mr. Ballard, you loaned Mr. McGread night six hundred dollars? A. Yes, sir.

"Q. What did he do with it? A. Bought poker chip it.

"Q. What did you loan him that money for? A. B he wanted it.

"Q. You expected to get it back as soon as you could Of course, if I could win it.

"Q. You say you loaned him money at the poker A. Yes, sir.

"Q. You counted him out the money and he woul chips from Huskey? A. Yes, sir.

"Q. Didn't you loan him the money for the purp buying poker chips? A. He could do as he pleased.

"Q. You regard his note as good? A. Yes, sir.

"Q. Why did you trade it off at such a discount when it was drawing eight per cent interest? A. Because I needed the money.

103 "Q. Why did you sign it this way? A. So that Mr. Higginbotham couldn't hold me for it. And he was willing to take it that way.

"Q. They knew it was a gambling note? A. I don't know anything about that; I loaned him the money and he gave me the note for it.

"Q. You loaned him the money and then won it back? A. There was other people in that game; there was Huskey and Brit.

"Q. Brit stayed there until he got his eyes open and quit? A. He quit the game winner.

"Q. Now, Mr. Ballard, why did you have 'or bearer' put in there? A. To make it negotiable.

"Q. Isn't it a fact that as well known as Mr. McGready is, his paper can be cashed any day in De Soto. A. I don't know.

"Q. Don't you know that his note is regarded as absolutely good? A. I don't know whether it is or not. I went to the German-American Bank and they said they didn't want any of his paper.

"Q. Who told you that Judge Higginbotham would buy it? A. You told me you thought he would buy it. The People's Bank said they didn't want it.

"Q. Can you prove that? A. Yes, sir.

"Q. Why haven't you got the people here? A. They can be got here. They told me they didn't want it.

"Q. Didn't they tell you they didn't want this paper? A. Didn't make any reference to that paper; said they didn't want any of his paper.

"Q. When did you put this stamp on there? A. When it was written.

"Q. Who did it? A. I put it on there.

"Q. Did this Mr. Graham tell the truth about everything he told here? A. I think he did.

"Q. Those checks, what became of them? A. He tore them up.

104 "Q. You loaned him the money? A. Yes, sir. It was just this way: after the game was all over Mr. McGready says to me, 'I have overplayed myself, Mr. Ballard, in this game,' and he said, 'I can fix this inside of a year, and if you

don't care I would like for you to carry me for a year
can give me those checks and I will give you my note
hundred dollars.' He wanted me to take his note for fi
dred dollars, and I told him I would if he would mak
negotiable note, and Mr. McGready wrote this note and
the stamp on it.

"Q. You let him have five hundred dollars? A. I
check before I let him have the money.

"Q. What did he write them with? A. He wrot
checks with a lead pencil.

"Q. Signed them F. E. McGready & Son? A. Yes

"Q. What bank? A. People's Bank.

"Q. Did he take up these checks before he left th
and give you this note? A. No, sir. It was written
stairs.

"Q. You gave him the checks back downstairs after
you the note? A. Yes, sir.

"Q. Those checks were never presented for paymen
No, sir."

This case was tried and disposed of by the circuit cou
its facts, as presented by the plaintiff, brought it wit
operations of sections 3426 and 3427 of the Revised S
of 1899, which provide:

"Sec. 3426. All judgments by confession, conveyances,
bills, notes and securities, when the consideration is m
property won at any game or gambling device, shall b
and may be set aside and vacated by any court of con
jurisdiction, upon suit being brought for that purpose
person so confessing, giving, entering into or executi
same, or by his executors or administrators, or
105 creditor, heir, devisee, purchaser, or other person
ested therein.

"Sec. 3427. The assignment of any bond, bill, note,
ment, conveyance or other security shall not affect the
of the person executing or confessing the same."

That plaintiff was a purchaser of the note in suit fo
before its maturity, and that he took it in absolute ig
of the consideration that resulted in its execution, ar
about which there is no dispute or conflict in the test
And for the sake of this discussion, it must also be co
that the note in suit was given as the result of money bo
by the defendant from the witness Ballard, during a g

poker played by said defendant with said Ballard and others, to enable defendant to purchase chips or checks (which are but a convenient representation of money used as the stake put up or deposited in lieu of money upon the table before the players engaged in gambling).

Under this state of the facts, then, was the note in suit of the character condemned by section 3426, above, as void, and subject to be vacated by any court of competent jurisdiction upon suit brought for that purpose, by the person executing the same or by his executor, administrator, creditor, etc., and was it of such a character as to carry its infirmity into the hand of an innocent holder by assignment, as provided in section 3427, supra?

That the note in question would not have been enforceable, as a binding obligation in the hands of the payee against the maker may be quite true, but from this, it by no means follows as a necessary corollary, that it is also nonenforceable against the maker, in the hands of an innocent holder for value. Between notes and other negotiable instruments made void ab origine by some positive statute, and those that may be found to have been made contrary to the rules of good morals simply, when they (the latter) have reached the hands [106] of an innocent holder for value, the courts have ever made a distinction. In the first instance, the note or contract being void by a positive declaration of law to that effect, can never thereafter be vitalized, purged of its illegality, or given new life by the hand into which it may thereafter fall, however innocent that hand may be of the corrupting and contaminating cause that led to its creation, but in the latter instance, the instrument is voidable only, and will be nonenforceable or enforceable as the court will withdraw its aid to one of the guilty participants to its making, or will give its aid to him or her into whose hands the instrument has come through the regular channels of business or trade in ignorance of its tainted inception.

Viewing the transaction that led up to and resulting in the making of the note in question, as its history is given by the witness Ballard, we are unable to see why this note in the hands of an innocent indorsee for value should fall under the ban of a statute leveled at notes and similar instruments given in settlement for money or property won at gambling.

While feeling that as little assistance as possible should be given by courts to compel the enforcement of gambling transactions, or of contracts in any way tainted by immorality as be-

tween the guilty participants thereto, yet we have no d
tion or authority to go one step in advance of the legi
fiat, denying protection to the innocent holder for va
commercial paper put upon the market by gamblers.
gambler will insist on closing up his unsuccessful transa
at the gambling table, by issuing his negotiable prom
note to his more successful brother gambler, thereby en
him to fleece some innocent third party, through a f
wrongdoing, he ought not to expect from the hands
court, as against an innocent sufferer from his act, other
the most rigid construction [107] of the statute he invoke
intended for the special benefit of him and his class,
seems to think, but adopted as an extreme expedient sol
an effort to put a check upon and to prevent as far as p
the practice of his crime (gambling). What, then, i
meaning of this statute, and is the note in suit, which d
ant now seeks to defend against, within its letter or spirit

Though the statute in question is not as clearly word
it might have been made, it is quite evident that the legis
did not mean by it to declare that all notes thereafter
in consideration of money borrowed or received that ma
at some time been won at some game or gambling device
be void, or that money or property won at gambling
thereby become so corrupted that it ever afterward wo
incapable of constituting a valid consideration for a note
for its use and enjoyment. This statute was directed
money or property that had been won at a game of cha
gambling device, but against notes and the other co
enumerated, that may be made or given in settlement
or wagers of money or property lost at some game of
or gambling device. The legislature did not aim its b
the inanimate dollar that might perchance be taken t
loaned or exchanged in the gambling-room by gambler
against the evil of gambling, and the most ruinous resul
follows the practice of permitting drafts upon one's futu
sources and energies to be made, to satisfy the losses of
ent vicious craving, as is done when one is permitted to g
and to satisfy his losses when they occur by the issuance
future payable obligations or contracts.

Here the note in suit, according to the testimony o
witness Ballard, was not given in settlement of a bet or
between himself and defendant, at a game of chance, w
Ballard was successful and the defendant was unsucce

nor was it given in consideration [108] of money or property won at any game of chance or by or through any gambling device, but it was given to Ballard by defendant in exchange for five checks which the defendant had drawn the previous afternoon and night upon his local banker in the city of De Soto, and given to said Ballard on account of money at that time borrowed from said Ballard during the progress of a game of poker then being played by said Ballard, the defendant and others. (The money was borrowed by defendant of Ballard to enable him to buy poker chips or checks, as they are commonly called, in order that he might continue in a game of poker then in progress, by betting said chips or checks upon the result of the game as it would progress from one deal of the cards to another.)

As said above, while this note in the hands of Ballard may have been defeated because the court would refuse its aid to assist one wrongdoer to enforce a contract made with another in the furtherance of an unlawful act, yet quite different is the situation of this plaintiff who is an innocent purchaser of the note for value before its maturity, with the rules of the law-merchant, and the provisions of our statute declaratory thereof to be applied in his favor. In our opinion, this note was not made under circumstances condemned by the statute in question, and for this reason it must follow that the trial court committed error against the right of plaintiff in directing the jury to return their verdict for the defendant.

To appellant's further contention, that section 3427 of the act in question should be declared unconstitutional in so far as it may be intended to discriminate against the holders of negotiable notes like the one in suit, who have taken them in the ordinary course of business, without notice of their infirmity, it need only be said that this section of the statute does not undertake to discriminate against the holder of any character of notes, obligations or contracts put under the ban of [109] the law by the preceding section. All notes, obligations, contracts, etc., that are made, issued or created under the conditions mentioned in section 3426, supra, are declared void, and the following section, 3427, merely declares that the assignment shall not affect the defense of the person executing the same.

While it may be conceded, as appellant asserts, that among the inalienable rights of the citizens is that of the liberty of contract, and further that the courts should ever guard with

zealous care legislative encroachments thereon, we are un
find that by the statutes in question any right of priva
tract guaranteed to plaintiff by the constitution is
taken away, or in any manner abridged. There is no
right in the plaintiff or any other citizen of the state
purchase or receive any kind or character of obligatio
tract or agreement made between others regarding the p
of money or property freed from the right of the maker
to interpose any defense he may have against its enfor
or collection. No curtailment of the right of the plai
buy or purchase any kind of a paper obligation, or to
whatever contract he may think proper with the holde
owner thereof, is sought or attempted by this statute. E
purchase and contract as freely now regarding notes and
tions of the character enumerated in the statute as he
prior to its enactment, but in aid of a declared policy
state, the legislature has simply enacted, as it had the m
right to do, that notes and other obligations enumerate
made under circumstances therein set out (whatever b
form) should be void, and, that the fact that made th
might be interposed by the maker as against anyone into
hands said obligations may fall.

If the legislature thought wise or expedient, there co
no doubt of its power to destroy the negotiability of not
obligations of every kind and character, and that too w
regard to whether they had [110] been made under con
and circumstances that would in any way affect their va

Appellant's contention that the statute in question
constitutional is without merit, but for the reason given
it follows that the judgment of the circuit court must
versed and the case remanded for a new trial, and it
ordered.

All concur.

A Negotiable Instrument founded upon a gambling transac
invalid as between the parties, but may be valid in the ha
a bona fide holder: Sondheim v. Gilbert, 117 Ind. 71, 10 A
Rep. 23. See, also, Drinkall v. Movius State Bank, 11 N. D
95 Am. St. Rep. 693, and cases cited in the cross-referenc
thereto; Pritchett v. Ahrens, 26 Ind. App. 56, 84 Am. St. Re
For cases where such notes have been held unenforceable e
bona fide purchasers, see Irwin v. Marquett, 26 Ind. App. 383,
St. Rep. 297, and cases cited in the cross-reference note the

GANNON v. ALBRIGHT.

[183 Mo. 238, 81 S. W. 1162.]

WILLS—Intention of Testator—Technical Rules.—In the Construction of wills, mere technical rules must yield to the obvious intent and purpose of the testator. (p. 472.)

WILLS—Construction—Cutting Down Estate in Fee.—When the words of a will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. (p. 473.)

WILLS—What Words Pass a Fee.—The words: "I give, devise and bequeath to my two sons, and unto their heirs and assigns forever, my farm," in the absence of qualifying words or subsequent limitations, pass a fee simple estate. (p. 473.)

WILLS—Use of "Heirs and Assigns."—Though the Statute Dispenses with the necessity of using the word "heirs" to pass a fee simple, still the use of the phrase "and unto his heirs and assigns forever" in a will casts no doubt upon the intention of the testator to devise a fee simple. (p. 473.)

WILLS—Use of "Bequeath" in a Devise.—If a will reads: "I give, devise and bequeath unto my two sons, and unto their heirs and assigns and heirs forever my farm," the use of the word "bequeath" does not weaken the force of the other words. (p. 474.)

WILLS—Construction of Restraint on Alienation.—If one clause of a will reads: "I give, devise and bequeath to my two sons, and unto their heirs and assigns forever, my farm," a subsequent clause reading: "It is my will that the same shall not be sold, at least not before the younger of the two becomes of age," should be construed to read: "I give my said sons full power to sell and convey said land when the younger becomes of age." (p. 475.)

WILLS—Power of Alienation—Void Limitation Over.—Where an estate is devised to one and his heirs and assigns forever, and there is added either by express words or by implication an absolute power of alienation, the limitation over is void. (p. 475.)

WILLS—Construction.—Effect must be Given to Every Word in a will, if it is possible without contravening the intention of the testator. (p. 478.)

WILLS—Construction—Interpolation of Words.—It must be presumed, in construing a will, that the testator used the words he intended to use, and in their plain and ordinarily accepted legal sense, and courts are not justified in interpolating other words and words of entirely different import. (p. 478.)

WILLS—Fee Tail—Dying Without Issue.—Section 6 of chapter 32 of the act of 1845 of Missouri, in effect declares that the words "dying without issue" shall mean a failure of issue living at the death of the ancestor named, and the use of such words shall not have the effect of creating a fee tail by implication. (pp. 479, 480.)

WILLS—Fee Tail—Executory Devise—Dying Without Issue.—If a will, in Missouri, contains a devise of a fee simple to the first taker by apt words, and thereafter a gift over on condition that he die without issue, "dying without issue" means dying without issue

living at his death. Therefore, a definite failure of issue is p
the executory devise over is good, and the first donee take
defeasible upon his dying without issue, living at his death.

WILLS—Construction—Dying Without Issue.—If a w
taining a limitation over after the death of the first taker
issue is susceptible of a construction that will make it ap
definite failure of issue, that construction should be adopted
than one making it applicable to an indefinite failure of issu
483, 484.)

WILLS—Remainder Includes Executory Devise.—If a
declares that where a remainder is limited to take effect u
death of a person without issue, the word "issue" shall
strued to mean issue living at the death of the person name
cestor, the word "remainder" includes an executory devise.

T. K. Skinker and Charles Cummings Collins, for
pellant.

Henry T. Kent and James W. Williams, for the respo

247 GANTT, J. This is an action of ejectment.
J. Gannon is the common source of title to the lot in su

Upon the construction of the fourth clause of the
Michael J. Gannon the rights of both sides to this cont
depend. The said clause is in these words:

"Fourth. I give, devise and bequeath unto my tw
Michael J. Gannon, Jr., and Joseph E. Gannon and un
heirs and assigns forever, my farm lying and being
county of St. Louis and state of Missouri, which lies
southern limits of Kirkwood, containing eighty acres,
same more or less. It is my will that the same shall
sold, at least not before the younger of the two, that is,
E. Gannon becomes of lawful age; and should either o
die without issue, then the survivor, his heirs and ass
take, own and have the part and portion hereby bequea
the one so dying. And in the event both should die
leaving any issue, then it is my will that my survivin
(with the exception of my son, John T. Gannon, who h
his share) shall have such property like and like."

Following the cardinal rule of construction it is our
ascertain, if possible, the intention of the 248 testator,
so doing, mere technical rules must yield to the obvious
and purpose of the testator. Among the more im
canons of construction that have uniformly found favor
court is the rule that when the words of a will at the
clearly indicate a disposition by the testator to give the
estate absolutely to the first donee or devisee, the esta
not be cut down to a less estate by subsequent or amb

words inferential in their intent: Small v. Field, 102 Mo. 104, 14 S. W. 815. There are some propositions in the construction of this will that are or ought to be free of doubt. First, by the words, "I give, devise and bequeath to my two sons, Michael J. Gannon, Jr., and Joseph E. Gannon and unto their heirs and assigns forever, my farm," etc. In the absence of qualifying words or subsequent limitations, a fee simple absolute was given to these two sons to the tract in question. This is so by the most rigid technical rules of the common law and everywhere recognized by the English and American courts, and unembarrassed by technical rules and refinements, the ordinary man would unhesitatingly say that this was the plain meaning of the testator. On this proposition we are all agreed and indeed it is not seriously controverted by counsel. It is true that it is urged that these words, "and unto his heirs and assigns forever," were not necessary, since our statute has dispensed with the use of the word "heirs" in conveying or devising an estate of inheritance, and it is argued that by the use of these unnecessary words the testator evinces a lack of confidence in the force of the words previously used, and for that reason casts a doubt on their meaning. We are unable to concur in such a view. While it is true that our statute no longer requires the word "heirs" to pass a fee simple, the use of these words in no manner casts any doubt upon the intention of a grantor or devisor who uses them to grant or devise a fee simple. It is doubtful whether any competent or skillful conveyancer ever dispenses with them in conveying [249] a fee. Why should the use of words so long approved and so absolutely necessary at common law to effectuate such a purpose indicate a different purpose merely because the statute permits other and less words to have the same effect? Notwithstanding our statute has dispensed with the word "heirs" in devising a fee, this court has often commended their use. In Chew v. Keller, 100 Mo. 370, 13 S. W. 395, Judge Black, speaking for this court, held that the words "to them and their heirs forever" created a fee simple, saying: "Stronger language could not have been used to show and disclose a purpose and intent to confer upon Levin Baker and the other named persons an absolute and unconditional fee. The estate is given to 'them and their heirs forever.' This expression, though unnecessary to create a fee, is an appropriate one for that purpose; and that the word 'heirs' is here used in its ordinary legal sense as one of limitation only cannot be doubted."

When, in addition to the words, "unto them and thei forever," the testator adds the significant words "and as it seems to us that instead of suggesting a doubt of his tion, no more suitable language could have been chosen chael Gannon to give his said sons an absolute fee simp they emphasize his intention to give them his whole es said tract: Wolfer v. Hemmer, 144 Ill. 554, 33 N. I Neither does the use of the word "bequeath" in any n weaken the force of the other words. "Bequeath" ha judicially construed by many of the ablest courts in this try to be synonymous with devise when used with refere a gift of real estate: Dow v. Dow, 36 Me. 211; Laing v bour, 119 Mass. 523, and cases cited. In this court it ha so held: Shumate v. Bailey, 110 Mo. 411, 20 S. W. 17 cum v. Siler, 160 Mo. 281, 61 S. W. 208.

In Greenwood v. Verdon, 1 Kay & J. (Cases in Chancer before Sir W. P. Wood vice-chancellor, the gift was to h John Verdon, and to his heirs and assigns forever, and and after the death of John without issue, then over to t viving legatees. The vice-chancellor said: "There are points about this will which do not admit of question. there is clearly an estate in fee simple limited to John V for the limitation is not merely to him and his heirs, his heirs and assigns forever. The first limitation here not only to the son 'and his heirs' which has often be strained to a particular line of heirs, but the limitatior the largest words, 'to him, his heirs and assigns forev could not rely upon those words alone, but as they ar and I have to consider whether or not the estate so lim cut down to an estate tail, I have to construe the effect o words upon the subsequent gift on the death of John without issue." After reviewing many English cases th chancellor summed up as follows: "The answer to this case must be, that, under the will of John Verdon, Joh don, the son, took an estate in fee simple, subject to feated by an executory devise in the event of his dying w issue living at the death of the last surviving legatee, and being issue living at that period, the estate in fee became lute."

These views sufficiently indicate our opinion that th sentence of the fourth clause of the will clearly and in biguous language devised a fee in this tract to the two So that we must reject the argument that a fee simple w created by these words.

But it is argued with great earnestness by counsel that while these words standing alone might be sufficient to create a fee simple, yet when considered in connection with the subsequent words of the will they in fact create a fee tail.

Let us consider, then, the words "unto them and their heirs and assigns forever," with the subsequent clauses of this fourth item of the will. Did the testator intend to give his said two sons an absolute fee, or a fee defeasible upon the death of both without issue, or [251] did he intend to create an estate tail? Two views are maintained by defendant. The first is that by the gift of an absolute fee in most appropriate language in the first instance and understanding and intending thereby that they had the absolute power of aliening the land thus devised to them, when he added the clause, "It is my will that the same shall not be sold, at least not before the younger of the two, Joseph E. Gannon, becomes of age," he gave, and intended to give, an additional power to sell when Joseph reached his majority. Keeping in mind, as we do, that he had already granted an estate to them to which the power of sale attached as a necessary incident and that he understood that he had done so, and that it was, therefore, his intention to do so, the clause restraining the sale until Joseph arrived at age must be construed and read as if he had said, "I give my said sons full power to sell and convey said land when Joseph, the younger of the two, becomes of lawful age." To our minds it seems absolutely clear that he understood he had already granted them a fee simple with the power to sell, and he only desired the land should not be sold during the minority of Joseph, but after that it was his will that no restraint should exist on their power to sell and convey. It is to be observed in this connection that the restriction is not to the sale of a mere life estate, but to a sale of the land itself. No such restriction was necessary if he had given them a mere life estate. We understand it is settled law that where an estate is devised to one and his heirs and assigns forever and there is added either by express words or by implication an absolute power of alienation, the limitation over is void. In our opinion the words of this restraining clause give an express power to sell, but if not there is clearly given such power by implication.

In 2 Redfield on Wills, page 277, it is said: "It is a settled rule of American as well as English law, that when the first devisee has the absolute right to dispose [252] of the property in his own limited discretion, and not a mere power of appoint-

ment among certain specified persons or classes, an est
is void, as being inconsistent with the first gift." Void
mainder, because of the preceding fee, after which a re
cannot be limited. Void as an executory devise, because
executory devise cannot subsist under an absolute power
position in the first taker. Thus Chancellor Kent says,
4 (fourteenth edition), 270: "If, therefore, there be a
lute power of disposition given by the will to the first t
if an estate be devised to A in fee, and if he dies posse
the property without lawful issue, the remainder over,
mainder over the property which he, dying without heirs,
leave or without selling or devising the same; in all suc
the remainder over is void as a remainder, because of t
ceding fee; and it is void by way of executory devise,
the limitation is inconsistent with the absolute estate, or p
disposition expressly given or necessarily implied by the
Jones v. Bacon, 68 Me. 34, 28 Am. Rep. 1; McKenzie's
41 Conn. 607, 19 Am. Rep. 525; Rona v. Meier, 47 Iow
29 Am. Rep. 493; Kelley v. Meins, 135 Mass. 231 an
cited; Howard v. Carusi, 109 U. S. 725, 3 Sup. Ct. Re
27 L. ed. 1089; 2 Washburn on Real Property, 6th ed
Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664, 61 L
455; Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751;
Hancock's Admr., 82 Ky. 107; Combs v. Combs, 67 M
Hoxsey v. Hoxsey, 37 N. J. Eq. 21; Wead v. Gray, 78 M
Van Horne v. Campbell, 100 N. Y. 287, 53 Am. Rep.
N. E. 316, 771.

If we are right in this position plaintiffs cannot r
Let us next inquire whether an estate in fee tail was in
to be created in these two sons and the heirs of their
And first, was there an estate tail created by express
The contention is that the word "heirs" expressed or imp
just as essential to the creation of an estate tail as of
tate in fee simple, the difference being that in the creatio
fee [253] tail a particular class or line of heirs must be ind
while in fee simple it is to the heirs general.

As understood by all lawyers, what is known as fee t
tates had their origin in the statute 13 Edward I, cha
(1285). The name "fee tail" was borrowed from the fe
amongst whom it signified any mutilated or truncated
tance from which the heirs general were cut off, or, as
say, because ownership of the subject was cut in two part
going to the donee and the heirs of his body and the oth

maining as a reversion in the donor: 2 Blackstone's Commentaries, 112n. (M.); 1 Coke's Littleton, 512-525. The familiar forms of creating such estates were "grant to A and the heirs of his body"; or "grant to A and the heirs male of his body"; or "grant to A and the heirs male of his body on Mary, his now wife, to be begotten": 2 Blackstone's Commentaries, 113, 114; 2 Minor's Institutes, 80.

In conveyances inter vivos the word "heirs" was necessary to create the estate, whereas in wills, any words manifesting the testator's intent were sufficient; thus, a grant by deed to a man and his issue of his body or to his issue or to his offspring, would pass only a life estate for want of proper words of inheritance, whereas in a will the same words would create an estate tail: 2 Blackstone's Commentaries, 115, 116.

In all the foregoing examples it is to be observed that the grant or devise is to the heirs of the body or to the issue or offspring, and these are cases wherein by express words a fee tail is created. Leaving out for the present any consideration of the creation of estates tail by implication, it is too obvious for serious discussion that there is no express gift by the testator to the heirs of the bodies of Michael J. Gannon, Jr., and Joseph nor to their issue. But the contention is that the word "heirs" is explained by the subsequent use of the word "issue" and they must be read together and so used they are synonymous with "heirs of his or their bodies," and thus interpreting the words "unto them [254] and their heirs and assigns," as "heirs of their bodies," an estate tail is created by express words. To us this seems a most unnatural and forced construction of the words "unto their heirs and assigns forever," words which, we have already seen, have a settled meaning in the law and carry on their face a clear unambiguous intention of passing or creating a fee simple.

In order to reach this conclusion the word "assigns" in said clause must be stricken out of the will, and utterly disregarded, in the face of the settled rule that in construing any document, deed or will we must give effect to every word if it be possible without contravening the intention of the grantor or devisor. In addition to striking out the word "assigns" we must interpolate the word "heirs of his or their bodies," and both to reach an intention in conflict with a plain and unambiguous intention to devise a fee simple to these two sons. To accomplish this, the first devise given to the natural objects of the testator's bounty is made secondary to the ulterior and contingent devise

over, found in a subsequent clause. We do not questio
courts may transpose the words of a will if necessary to
the true intention of the testator, but we insist that it m
presumed that the testator used the words he intended
in their plain and ordinarily accepted legal sense, and
not justified in interpolating other words and words of e
different import. By resorting to such a course we imp
ambiguity in the will and then substitute words which t
tator did not use to remove that ambiguity. We submit
is no occasion for resorting to such refinements to avo
force and effect of a plain devise of a fee simple to the tw
and hence we say that there is nothing in the language
will to justify the construction that an estate tail was l
by express words. Such a construction is only reached b
the plain and ordinary signification of the words "to the
their heirs and assigns forever" puts them in a su
255 conflict with the subsequent contingent disposition
land in suit. But there is no such conflict—the obviou
pose was to give the two sons a fee simple in the lan
feasible if they should die without issue or children liv
the death of the survivor of the two sons named, and i
should die leaving no issue living at the death of either o
then an executory devise over to the other heirs of the te
a disposition entirely legal, if the testator had not alrea
nexed to the fee devised to them the absolute power of di
but as that contingency never happened and never can h
because both of said sons left children, the plaintiffs i
case, surviving them, the fee simple became absolute in t
sons and their grantees, the defendant and others, even
power of sale was not superadded.

But we are now brought to the further contention that
tail was devised by implication. We concede that und
statute de donis a fee tail may be created by implicatio
in this case, if a fee tail is to be implied, it must be by co
ing the words "dying without issue" to mean an indefinit
ure of issue, and that consequently the executory devise
void for remoteness. Such was the case of Farrar v. C
24 Mo. 453. That was the construction of a deed made i
in which the grant was "to have and to hold the pr
aforesaid with all the appurtenances thereto belonging to
and their heirs forever, upon condition that should eit
the grantees herein named die without legal heirs of their
the survivor shall inherit the whole of the property hereb

veyed; and should both die without leaving heirs as aforesaid, the property conveyed shall revert to the other legal heirs of the said William and Martha T." It was conceded that these words, "should die without legal heirs of their body," created a fee tail by implication under the statute de donis. At the date of that decision, morover, section 6 of chapter 32 of the Revised [256] Statutes of 1845 had not been enacted, and the words "dying without issue" without further limitation at the time were held and construed by both the English and American courts to mean an indefinite failure of issue, and by implication to create a fee tail in the first taker or ancestor named. It is too plain for discussion that the majority of the court in Farrar v. Christy, 24 Mo. 453, did not and could not have had section 6 of chapter 32 of the Revised Statutes of 1845 under consideration in deciding that cause. Judge Leonard dissented.

Harbison v. Swan, 58 Mo. 147, is also relied on as controlling the construction of this will. It is true that the will in that case was made in 1846 and the testator died in 1852, but it is to be observed that this court in deciding that case based its decision on Farrar v. Christy, 24 Mo. 453, and the common law, and made no reference whatever to section 6 of chapter 32 of the Revised Statutes of 1845, and it cannot be said that said section was construed by the court. The will was construed with reference to the common law and the act of 1825 alone, and the attention of the court was not called to the act of 1845 by counsel in the case. Moreover, there were no words in that will from which a power to sell could be implied, and in that respect it differs materially from the will under consideration.

Conceding that prior to the act of 1845, the words "dying without issue" had been construed to mean an indefinite failure of issue at any time, and that many of the courts of England and of this country held these words created an estate tail by implication, what effect is to be given these words since the act of 1845, section 6, chapter 32, went into effect? Obviously, they were enacted to settle forever the construction to be placed upon the words "dying without heirs" or "without issue" in the future by our courts, and that they should not be construed in deeds and wills thereafter made to mean an indefinite failure of issue, and by implication to create estates tail, but henceforth they should be construed [257] to mean "heirs or issue living at the death of the person named as ancestor." Granting that if section 5 of the act of 1845 stood alone, those words would create an estate tail under the statute de donis, and that the case of

Farrar v. Christy, 24 Mo. 453, falling under the act of 182
properly decided, still it was competent for the legislat
pass the act of 1845, and thereby modify the act of 182
in effect command that whereas these words had been h
the courts prior to the act of 1845, to create a fee tail,
the future those words should no longer be held to me
indefinite failure of issue, but a failure of issue living
death of the ancestor named, and thereafter their use
not have the effect of creating a fee tail by implication, bu
an executory devise over after these words should be goo
this is not its meaning, what effect is to be ascribed to thi
ute? The section on its face shows it was the work of a t
lawyer, familiar with the conflicting views of the cou
England and this country as to the meaning of the words
ing without issue," and evinces a determination to set
positive statutory enactment the meaning of those words
future deeds and wills in this state, and that thereafter
the question arose as to whether these words created a f
under the statute de donis, they should be construed to
"issue living at the death of the ancestor" named, and n
plication of a fee tail should arise to be at once destroy
converting it into a life estate. If we do not so constru
section 6 of chapter 32 of the act of 1845, we in effect de
authority, which we have no right or power to do. But
told that fee tails never have existed in this state, havin
abolished in 1816, when Missouri was a territory, and,
fore, we are not to inquire whether these words create an
in fee tail in Missouri since the act of 1845, as there can
estates tail in Missouri, but whether by the common la
it was a case wherein the devisees would have been seise
fee tail.

Chancellor Kent in his Commentaries (fourteenth ed
volume 4, page 280, states that in Virginia by statute in
and in Mississippi by Revised Code of 1824 and in North
lina by statute in 1827, the rule in construction of devises
as deeds, with contingent limitations depending upon the
of a person without heirs or without heirs of the body or
or issue of the body or children, was declared to be tha
limitation should take effect on such dying without he
issue living at the time of the death of the first taker o
within ten months thereafter"—and says it is further de
"that when a remainder shall be limited to take effect
the death of any person without heirs or without issue the

'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." The great chancellor then adds: "These provisions sweep away, at once, the whole mass of English and American adjudications on the meaning, force and effect of such limitations. The statute speaks so peremptorily as to the construction which it prescribes, that the courts may not, perhaps, hereafter, feel themselves at liberty to disregard the direction, even though other parts of the will should contain evidence of an intention not to fix the period of the devisee's death for the contingency to happen, and that the testator had reference to the extinction of the posterity of the devisee, though that event might not happen until long after the death of the first taker. They might be led to regard any such other intent, collected from the whole will, if such a case should happen, not to be consistent with the positive rule of construction given by the statute to the words 'heirs' and 'issue.' Yet, when we consider the endless discussions, and painful learning and still more painful collisions of opinion, which have accomplished the history of this vexatious subject, it is impossible not to feel some relief, [259] and to look even with complacency, at the final settlement, in any way, of the litigious question by legislative enactment."

Accordingly, we have a statute in this state almost in totidem verbis with the statutes mentioned by Chancellor Kent, and it seems impossible to escape the logic of that distinguished jurist and chancellor that the courts are bound by this statutory construction, and accordingly when we find a devise, as in this case, of a fee simple to the first taker by apt, appropriate and long approved words, and thereafter a gift over on condition that he die without issue, "dying without issue" must be held to mean dying without issue living at his death, and, therefore, a definite failure of issue is provided, and the executory devise over is good and the first taker takes a fee defeasible upon his dying without issue living at his death. If he die with such issue living, the estate in fee is absolute. If he die without issue living at his death, it goes over to the executory devisee to whom it is limited.

It is true that estates tail have never existed in this state as they were abolished in 1816 by the territorial act of that year, and the act of 1825 provided "that in cases where by the common law any person or persons who would then be or might hereafter become seised in fee tail," such person was to have a life estate only and the remainder pass in fee simple to the one

next in line, and the act of 1845 practically continued
provision, but correctly referred estates tail to the statu
donis. The estates tail disposed of by those enactments
such as were defined by the statute de donis, but surely i
not be contended that legislative power was exhausted by
acts. By the same legislative power it was entirely comp
by subsequent enactment to declare what meaning shou
given by the courts to certain words when thereafter us
wills and deeds, and this is what was done by section 6 o
act of 1845 passed contemporaneously [260] with the enact
of section 5, for the first time commanding and directing
if the words "dying without heirs or heirs of the body" o
sue" should be used those words should be construed to
"dying without issue living at the time of the death of the
son named as ancestor." If the legislature had the pow
pass that statute, and this will not be questioned, the c
must read that statute into all instruments executed sin
passage and containing those words. The only question le
the courts to determine is whether an instrument constru
the legislature has directed that it shall be done would cre
estate tail under the statute de donis, if so read. By al
canons of construction section 5 and 6 of the act of 1845
sections 4592 and 4593 of the Revised Statutes of 1899)
be read together and when so read they direct that in
"where by the common or statute law of England any p
or persons would now or might hereafter become seised i
tail, such person shall only have a life estate with remaind
fee simple to the one next in line," but the courts in determ
whether an instrument would have created a fee tail at com
law shall construe the words "dying without issue" when
in such instrument to mean "dying without issue living a
death of the person named as ancestor." There is no co
between the two sections and both can be made effective.
one abolishes estates tail and the other prescribes the me
and construction of certain words for the government of
courts in determining whether an estate tail by implicati
created by the instrument to be construed. In this conne
it is well to note that other states have adopted provisions
lar to ours in this respect, notably New York, New Jersey
Michigan.

Jarman on Wills, volume 1 (sixth edition), page 521,
cussing the creation of estates tail in England by implic
from the use of the words "dying without issue," says:

implication of an estate tail can arise from [261] words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the statute, 1 Victoria, chapter 26, section 29, provides that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will.

"Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the legislature."

Underhill on Wills, volume 2, page 870, after a full discussion of the same subject, says: "The doctrine of the creation of an estate tail by implication, above explained, has no application whatever where an estate is a fee simple, with a limitation over upon failure of issue, and it appears either from the will itself, or where the common-law rule is modified by statute, that the failure of issue referred to is the failure of issue living at the death of the first taker. If the primary devisee has an estate in fee which is defeasible upon a definite failure, i. e., of issue living at his death, it becomes indefeasible in him on his having issue who survive him, and he may provide for such issue by devising the fee to them."

Accordingly, we hold that the statute of 1845 read into this will renders it impossible that the words "dying without issue" should have the effect of creating an estate tail and thereby cutting down the estates of [262] Michael J. Gannon, Jr., and Joseph to life estates only, remainder in fee to plaintiffs, their children.

But independently of the statute there is much room for holding that even under the English and American decisions the will contains enough to show an intention on the part of the testator that the words "dying without issue" referred to issue living at the death of the survivor of said two sons.

If the language of the will is susceptible of a construction that will make it apply to a definite failure of issue, that construc-

tion should be adopted. The first limitation is to the su of these two sons, meaning clearly issue living at the de one of these two sons who should die first, and the next tion is, "and in the event both should die without leavin issue, then it is my will that my surviving heirs (with t ception of my son, John T. Gannon, who has had his shall have such property like and like."

Surviving when? Manifestly, when both die without l any issue. The words "leaving" and "surviving" refer in of time to the death of the survivor of the two sons. The John T. Gannon who was living at the time the will was is excluded from participation, showing in this additional ner the time in the mind of the testator.

But it is also said that the word "remainder" in sect chapter 32 of the Revised Statutes of 1845 is a technical and does not include an executory devise. We think this narrow a construction to place upon this word in the conn in which it is used. The preceding section 5 in that act alike to "conveyances or devises," and section 6 speaks mainders limited by deed or "otherwise." The word "re der" is often used by text-writers to include an "executo vise," and this court has construed this word in this ide section 6 of the act of 1845 to have that significance.

Fearne on Remainders, volume 2, page 159, says: 263 term 'remainder' is sometimes used in a lax sense, to any kind of subsequent interest, or the limitation thereof.'

Chancellor Kent in his Commentaries, volume 4 (four edition), page 274, says: "A devise in fee with remainde upon an indefinite failure of issue is an estate tail; and in to support the remainder over as an executory devise, and rid of the limitation as an estate tail, the courts have freq laid hold of slender circumstances in a will, to elude or the authority of adjudged cases." Blackstone uses the wo synonymous: 2 Blackstone's Commentaries, 173. But in man v. Sherman, 3 Barb. 385, the statute of New York Stats. 1829, vol. 1, p. 724, sec. 22), which our legislatur dently adopted when it enacted section 6, chapter 32 of th vised Statutes of 1845, came before the court for constructio it was held that the word "remainder" included "executo vise," and the limitation over was held to be a good exe devise, and, moreover, that the statutory definition and n common-law meaning of the words "dying without heirs body or without issue" should control. That statute was

ward adopted by Michigan, and in Mullreed v. Clark, 110 Mich. 229, 68 N. W. 138, came under review by the supreme court, and it was held to govern an executory devise, and that decision is peculiarly applicable here because in that case the devise was to James Phillips, but if he should die without heirs then over, and the court held that "James Phillips took a fee defeasible at his death without issue living at that time." If he had issue then living, the fee became absolute. If none then living, it went over to the devisees named in the will. But the point is that the word "remainder" applied in full force to executory devises.

But in Faust's Admx. v. Birner, 30 Mo. 417, in construing the will of John Birner this court held that the words "dying without issue" must, in this state since the Revised Statutes of 1845 went into effect, be construed [264] to mean dying without issue living at the death of the ancestor named, and that act applied to executory devises, saying, "this is a good executory devise to the brothers."

Again, in Naylor v. Godman, 109 Mo. 550, 19 S. W. 56, this court, through Judge Sherwood, quoted this identical section 6 of the act of 1845 and held it applied to an executory devise, and it was so held in Yocum v. Siler, 160 Mo. 289, 61 S. W. 208.

To sum up, then, we hold that the will of Michael Gannon does not create an estate tail by express words; that there is no express limitation therein to "the heirs of the body" or to the issue of the two sons, Michael and Joseph; that it does not create an estate tail by implication, because both by the language of the will and especially by the positive command of the statute of 1845, the words "die without issue" mean dying without issue living at the death of said Michael and Joseph, and therefore mean a definite failure of issue, and hence no fee tail can be implied from their use, and, finally, that by the said fourth clause of the will the said two sons took a fee simple subject to be defeated upon their dying without issue living at their death, and as both died leaving children, the plaintiffs herein, the contingency upon which their fee simple was to be defeated never happened and never can happen, and their estate in fee became absolute, and their warranty deeds conveyed to defendants' grantors the fee simple title. A different conclusion was reached in the construction of this same clause in the will of Michael J. Gannon by division one of this court in Gannon v. Pauk, 183 Mo. 265, 83 S. W. 453, at the October term of this court, but upon reconsideration of the said clause in this case

by the court in Bank, we are not satisfied with the op division one construing said clause, and must decline t it as the proper construction of this will, and the judg the circuit court must be and is reversed.

265 Robinson, C. J., Burgess and Fox, JJ., concur.

Brace, Marshall and Valliant, JJ., dissent and expr views in an opinion by Valliant, J.

In Dissenting from the Majority of the Court in the princ Justice Valliant wrote no opinion, but, for an understandin views of himself and the other dissenting justices, referre opinion in Gannon v. Pauk, 183 Mo. 265, 83 S. W. 453, overruled by the principal case. Gannon v. Pauk involves fourth clause of the Gannon will that is involved in the case; and the opinion therein, so far as it concerns the tation of such clause, reads as follows:

"If the first sentence of this clause was all there was of could be no question about it. In language more express purpose to give an absolute fee than necessary, the testat the devise in the first sentence and concludes it with Whether by the use of the words, 'and unto their heirs an forever,' the testator intended to emphasize a purpose to absolute fee, is a question that we can answer only afte the whole clause, perhaps the whole will. The mere use words, unnecessarily, does not always indicate such a pur fact it not unfrequently suggests a lack of knowledge of w essary to express a given purpose; it often evinces a lack fidence of the writer in the force of the words previously for that reason casts a doubt on their meaning. One who k own purpose and knows how to express it is less liable to mu words than one less informed. The consequence is that see words unskillfully used, especially technical words, we certain of the meaning intended than we would be if the wo used with skill. That is the reason that we are required, come to construe a will, to give less force to the form pression than we do in construing some other instruments gather, if we can, in spite of the sometimes inappropriat technical words, the real purpose of the testator. The give and bequeath unto my two sons, Michael J. Gannon, Joseph E. Gannon, ... my farm lying and being in th of St. Louis,' etc., were sufficient, if left alone, to carry a ple to the devisee. If that was the design of the testat the addition of the words 'and unto their heirs and assi ever' really gives no force to the preceding sentence and

gests that the testator was not sure as to the meaning of the words already used or even of the words unnecessarily added.

"Those words in this will are just as apt to an estate tail, if that was the intention, as they are to an estate in fee, if that was the intention. The word 'heirs' expressed or implied is as essential to the creation of an estate tail as of an estate in fee simple, the only difference being that in the one particular heirs must be indicated while in the other general heirs is meant. Did the testator intend to give his sons an absolute fee, or a fee determinable upon the death of both without issue, or did he intend to create a fee tail?

"It is not contended by the respondents that the testator intended to give an absolute fee, but the argument is that having granted an estate in fee and conferred with it the power of absolute disposal of the property, an absolute estate was thereby created and the attempted limitation over was void. The legal principle announced in that proposition is correct and the authorities cited by the learned counsel sustain it. 'If, therefore, there be an absolute power of disposition given by the will to the first taker (as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same); in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate, or power of disposition expressly given, or necessarily implied by the will': 4 Kent's Commentaries, 4th ed., p. 270; 2 Washburn on Real Property, 6th ed., 667; Yocum v. Siler, 160 Mo. 281, 61 S. W. 208; Roth v. Rauschenbusch, 173 Mo. 582, 73 S. W. 664, 61 L. R. A. 455.

"To apply that doctrine to this will, however, we would have to assume: 1. That the estate devised to the first takers was an estate in fee simple, which is one of the main points in dispute; and 2. That the language of the will expressly or by necessary implication confers an absolute power of disposal of the property on the two sons. Passing for the present over the first point, let us see if the power of disposition is expressly or by implication conferred.

"Taking the text just quoted wherein the rule is correctly stated, we see that the power of disposition referred to is not that which might be implied as an attribute of the estate granted, but in order to have the effect of cutting off the executory devise, it is a power given by the will in addition to the estate. A power of disposition is implied in every grant of a fee simple, yet the power so implied will not render void an otherwise valid executory devise, but when the fee is granted and, besides that, the power of disposition is added, then there can be no limitation over. There is no such added power in this will; the most that can be claimed for the language used in reference to that point is that it indicates that the testator under-

stood that the power to sell was incident to the estate already
and he aimed to restrict that power. The language is: 'I
will that the same shall not be sold, at least, not before the
of the two—that is, Joseph E. Gannon, becomes of age.' T
therefore, no such power of disposition given in addition
estate given as would render void an attempted executory
If it is a determinable estate by the words of its own creatio
not been made absolute by the words affecting the power o

"A determinable fee is defined to be, 'An interest whi
continue forever, but the estate is liable to be determined
the aid of a conveyance, by some act or event, circumscri
continuance or extent': 4 Kent's Commentaries, 14th ed., p. 5
an estate to continue until the event named occurs, then it is t

"In this case, according to respondents' theory, it was a
in fee simple in the two sons of the testator, determinable
death of both of them without issue then living, and sin
both left issue living when they died, the event, on the occur
which the estate was to determine, became of impossible occ
and the estate became a fee simple absolute.

"But to build their case on that theory respondents must
that the two sons took an estate in fee simple in the first i
because if they took only an estate in fee tail it would no
creased to a fee simple by the occurring of the event upo
it was to cease. In other words, if the will had said, in
verbis, 'I devise to my two sons Michael and Joseph and
heirs of their bodies respectively in fee tail forever' the
question, 'but if they both die without leaving issue living
time of the death of the one last living then I will that t
go to my heirs,' it would make no difference so far as conc
interest that Michael and Joseph personally took whether t
issue or not; if they had no issue the executory devise woul
the fee to the heirs of the testator, and if they had issue th
would go to their issue in fee tail, but in either event it wo
affect a title derived by deed from the two sons.

"There is nothing on the face of the will to suggest t
testator intended to say that the estate was to be a fee tai
sons had children and a fee simple with a limitation over
form of an executory devise if they had none.

"If this will gave to the two sons a fee simple estate deter
only on the death of both without issue, then since they b
issue living, their deed conveyed an absolute title, and the p
are not entitled to recover, but if the will gave only an es
tail, then by force of our statute, the sons took only a life
and it makes no difference whether we construe the continge
which the executory devise depended to be a definite or an in
failure of issue, or whether the executory devise was valid o
for in either event the land belongs to the plaintiffs. An ex

devise may be created to take effect as well on a condition that will terminate an estate tail as one that will terminate an estate in fee simple. The mere fact, therefore, that an executory devise is created to take effect on the happening of an event which would cause the preceding estate to determine, does not give character to that estate. We are now talking about an estate tail which appears in express words or by natural intendment in the instrument creating it and independent of the inference to be drawn from the limitation over in the nature of an executory devise.

"In interpreting the statute under which estates tail were created, the English courts were very technical in their reasoning and placed much value on the use of certain words. The words, 'heirs of his body,' or their equivalent, were deemed essential to the creation of an estate tail. In 2 Preston on Estates, page 473, it is said: 'The same rule which requires the limitations to be to the feoffee and his heirs, either by express words, or by words of direct and immediate reference, in order to the transfer of an estate in fee by deed at common law, also requires that, in order to the creation of an estate tail by deed, the gift shall, either by express words or by words of direct and immediate reference, be to the donee and his heirs. So a gift to a man and his heirs, viz., heirs of his body, will, by reason of the qualification, be an estate tail. . . . . The nature and qualities of estates tail admit of one case peculiar to these estates. An estate even in a deed may, contrary to the general rule of law, arise from necessary implication. Thus, a gift to a man without any limitation to his heirs, but with a provision that the land shall revert to the donor, or remain to another, if the donee shall happen to die without heirs of his body, will afford ground for construction that the donee is to have the land to him and his heirs of his body, because the land is not to revert, or remain over, until there shall be a failure of these heirs. . . . . The true reason is, that the intent of the donor appeared in express words in the deed; and the implication was a necessary one. . . . . Words of reference in limitations of estates tail operate in the same way as words of reference in limitations of estates in fee. By the reference they have the effect of the very word to which the reference is made, and are precisely of the same import as these words.'

"After quoting from a number of cases the author, page 528, says: 'From all these cases it may be assumed as a general position that though the word "heirs" stands general and uncorrected in one sentence, it may, by the clause of another sentence, which introduces an ulterior gift, be corrected and explained, if the word "heirs" generally in the first clause, is by the words of the second clause explained to mean heirs of the body.'

"In the text quoted the law-writer has mentioned two kinds of cases in which estates tail may be created otherwise than in totidem verbis, one which he distinguishes as peculiar to the nature and

qualities of estates tail, that is, where the grant is in words indicative of an estate, either for life or in fee simple with no other words in direct reference, either to enlarge or qualify their meaning, yet followed with a provision that the land revert or remain over if it should happen that the donee die without heirs of his body, in which case by implication, the life estate is enlarged or the fee is cut down to a fee tail; the other is where words in the first instance are used which if unexplained or unqualified by direct reference would indicate an intention to create a fee simple, yet which before the donor finishes the subject are so explained or qualified as to show that he meant to use them in the sense that would create an estate tail, then an estate tail is directly created, which is not an estate in fee simple, cut down by implication, but an estate tail by force of its own creative words. A grant to A and his heirs forever, but if he should die without heirs of his body, then to B and his heirs forever, is an example of an estate tail by implication. But a grant to A and the heirs of his body forever is an estate tail by direct words, and equally so, even though more clumsily expressed, if it be to A and his heirs forever, to have and hold unto the said A and the aforesaid heirs of his body forever, or words equally significant of an intention from first to last to create an estate tail. When we have to deal with a case under the first class referred to, it is important to know if the deed refers to a definite or to an indefinite failure of issue, but when we have a case under the second class that is immaterial.

"The above quotations are taken from what the law-writer said on the subject of estates tail created by deed, but as to such estates created by will he said (p. 534): 'Let it be remembered, that in wills, that strictness of the law which, in regard to deeds, requires that the limitation shall be to the heirs by that word, and not by a circuitous expression (except in the cases of a gift in frank marriage, and of cases of direct and immediate reference), and that these heirs shall, in the case of limitations in tail, be distinguished by words of procreation, descriptive of the body from which the heirs are to issue, or the person by whom they are to be begotten, is relaxed. . . . . Though in construing wills, the words which in a deed would create an estate tail will give a like estate, this rule does not apply when reversed; for words which in a deed pass an estate in fee, and again, words which in a deed give only an estate for life, may, in a will, pass an estate tail. Thus, a feoffment to a man and his heirs male, without any context, conveys an estate in fee. In this case the word "male" is rejected as surplusage. In a will the word "males" will be retained, and a devise in these words will pass an estate tail; for the law in favor of the intention of the testator will supply the words of the body. So if a feoffment be to a man and his heirs, and if he shall die without issue (giving no direction that the issue shall be of his body), then over, the feoffee

will have an estate in fee. In a devise by these words, the devisee will have an estate tail.'

"Thus the law is, that when we are required to ascertain the character of a gift in view of the statute de donis, whether it be under a deed or a will, the main object is to discover the intention of the donor and adjudge the character of the gift by that intention; yet when it is a deed that we are dealing with we are under more restraint than when it is a will. Under a deed if the word 'heirs' is used in the granting clause, it may be cut down to mean heirs of the body of the donee, provided the words of procreation are used in the context directly referring to the former word, as if it should say, 'to him and his heirs, that is, heirs of his body,' or if it should say, 'to him and his heirs,' and then in a sentence closely following and referring to the gift say, 'to the aforesaid heirs of his body.' But in case of a will words of direct reference are not necessary. If, taking the whole instrument as expressing his intent, we find that the testator really intended to limit the estate to his sons and their descendants in direct line, then we should say that the will creates what at common law would have been an estate tail.

"Let us under the light of these rules of construction search for the testator's intention in this fourth clause of his will.

"The words employed show that the testator was not sure that he knew what words were necessary to express his idea, and the technical words he did use were not used with precision. The word 'bequeath' was inappropriate, and the words 'heirs and assigns forever' were at least unnecessary if the intention was to give an estate in fee simple. If the intention, however, was to limit an estate, to the sons and the heirs of their bodies forever, the word 'heirs' was not unnecessarily used. Our statute which renders the word 'heirs' unnecessary in the grant of an estate in fee under certain conditions has no reference to estates tail; they are to be judged by the law as it came to us from England. The inappropriate or unnecessary use of those words, however, signifies nothing more than that the document was not written with technical precision; they do not tend to obscure the meaning, but they admonish us not to adhere too closely to the technical meaning of the words used. The testator did not intend to give his two sons an absolute fee in the property. This is shown by the fact that immediately following the words of grant are conditions and restrictions; first, the property is not to be sold until the younger comes of age, and, second, if either should die without issue, the other should have the estate. The purpose to create cross-remainders is thus shown. If the word 'heirs' had not been used in the first sentence, there would perhaps have never risen a question but that the estate granted in that sentence was qualified by the grant of cross-remainders in the sentence next following. But as we have seen from the authorities quoted the word 'heirs' in the first sen-

tence is explained by the word 'issue' in the sentence following and those words are to be taken together. The two sentences coming together and relating to the same subject, show that when the testator used the word 'heirs' in reference to his sons he meant their children, he used the words 'heirs' and 'issue' as synonymous and taken together they mean heirs of their bodies. That is the natural interpretation to put on his language and the interpretation that we are authorized by the law to put upon it. Interpreting the word 'heirs' in the first sentence to mean heirs of the bodies of the testator's sons, we have an estate tail and we render all parts of the clause in harmony. He intended that if his two sons had children the estate should be limited to them, and their children to descend in that line, but if either of his two sons should die without leaving a child then living, the estate should pass to the other son and his heirs; and he used the word 'heirs' in that connection in the same sense that he used it in the first sentence, that is, as meaning child or children, and his intention was that the estate should be kept in that line of descent. The limitation to the surviving son was a good remainder and would have been good as such in a deed, because a remainder may be limited on an estate tail: 2 Fearne on Remedies, 192; 2 Washburn on Real Property, 6th ed., 1539. But it would not have been good as a remainder if the first estate granted had been fee simple, because a remainder cannot be limited after a fee. The next expression of the testator's wish was that if both of his sons should die without issue, that is, if the estate he had (somewhat clumsily yet with sufficient precision to indicate his intention) created should fail because of a failure of heirs of the bodies of his sons, then it should revert to his general heirs. In the remainder to the one son on the death of the other the period at which it was to take effect was at the death of the other without issue, then living. This is so, not by any artificial rule of construction, but by the facts of the case itself. The two brothers were both living, and the remainder was to the one who should survive if the condition then existed. But if they should both die without issue, then the estate should return to the heirs of the testator.

"Respondents contend that this last limitation was an executory devise, that it was good only in the event the two sons had died without issue living at the time of the death of the one last dying, in which event it would have cut down the fee in the first takers and converted it into an estate tail, but that since both of the first takers left children living when they died, the executory devise became void and the estate remained a fee simple.

"We do not construe the will to be a devise of an estate in fee simple in the first instance, and, therefore, we do not hold that the estate derives its character as an estate tail by being cut down by the limitation of the executory devise. We hold that by the use of the word 'heirs' in connection with the word 'issue' the testator

intended to give the estate to his two sons and the heirs of their bodies, and thereby created in the first instance what would have been at common law or by the statute de donis an estate tail.

"But even if it be construed to have been an estate in fee simple in the first instance, we would feel constrained, by the weight of authorities and the former rulings of this court, to hold that by the clause declaring that in case of the death of both sons without leaving issue the estate was to revert to the heirs of the testator, the fee was cut down to a fee tail: Farrar v. Christy's Admrs., 24 Mo. 467; Harbison v. Swan, 58 Mo. 149; Thompson v. Craig, 64 Mo. 312; Wood v. Kice, 103 Mo. 329, 15 S. W. 623.

"The doctrine laid down in the earlier of those cases and followed or approved in the later ones is that, where a devise to one in terms sufficient, if standing alone, to give an estate in fee simple is followed by a clause providing that if the devisee should die without issue the estate should revert to the heirs of the testator or go over to another as an executory devise, the estate to the first devisee is by implication cut down to an estate tail. But in Yocum v. Siler, 160 Mo. 281, 61 S. W. 208, this court, per Gantt, J., said: 'Yet when it is considered that this conclusion was only reached by holding that the "words dying without issue" meant an indefinite failure of the issue, and this postponed the vesting of an executory limitation so long that it violated the rule against perpetuities and was therefore void, as our statute of 1845 gave a different meaning to these words, and directed they should be construed as meaning heirs or issue living at the time of the death of the ancestor named, no such implication can longer be raised from their use in this state.'

"What is there said is the main foundation for the position taken by respondents, and it does justify them in saying that by force of the statute of 1845 (now section 4593 of the Revised Statutes of 1899), under the case above stated, the words 'dying without issue' mean dying without issue living at the time of the death of the ancestor, and that if at the death of the ancestor there is issue living, the executory devise is extinguished and the estate in fee in the first taker remains unimpaired.

"The interpretation put upon the will in the case of Yocum v. Siler, did not depend on the aid of that statute as there construed, for there was on the face of the will itself sufficient to show that the words, 'If my said son dies without legal issue,' meant issue living at the time of the son's death. The limitation over in that case was not, as in the case at bar, to the indefinite heirs of the testator, but to individuals named who were then living, showing without resort to rules of construction, that the testator intended to say issue living at the time of his death. The writer of this opinion concurred in the opinion in that case and has no thought now to question the correctness of the conclusion reached, but after a second study of the subject

he is of the opinion that the statute of 1845 did not apply to the facts of that case.

"Estates tail never existed in this state. They were abolished by act of the General Assembly of the Territory of Missouri in 1816: Ter. Laws 1815-16, p. 32. And again by act of the General Assembly of the state in 1825, it was enacted: 'That in cases where by the common law any person or persons would now be, or might hereafter become seised in fee tail,' such person was to have a life estate only and the remainder pass in fee simple to the one next in line: Rev. Stats. 1825, p. 216. That has continued to be substantially the statute law to the present time, the language of the present statute being: 'Sec. 4592. In cases, where by the common or statute law of England, any person might become seised in fee tail of any lands,' etc., he shall have only a life estate and the remainder in fee simple pass to the person next in line. The estates tail there disposed of were such as were then defined by the rules of the common law and the statute de donis, not such as might be affected by any other rules.

"The statute treated only of estates that had the characteristics, which, by the common law or the statute de donis, appertained to estates tail, and it says in effect that whenever an estate shall be created having those characteristics it shall be a life estate to the first and a fee simple to the second.

"That had been the law for more than twenty years when the act of 1845 was passed, and its language in that particular has not changed. If we say the act of 1845 shall apply, then we may have a grant which under the common law or the statute of England would be an estate tail, yet we cannot give to it the effect that the act of 1825 says it must have, we rob that act of its force.

"We do not think the act of 1845 was intended to apply to such case. That act is now section 4593 of the Revised Statutes of 1899, and is as follows: 'Where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs, or heirs of his body, or without issue, or on failure of issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.'

"That statute by its terms relates only to remainders; an executory devise is not a remainder: 4 Kent's Commentaries, 14th ed., p. 270; 2 Washburn on Real Property, 6th ed., secs. 1743-1746. It would be applicable in this case (if necessary to a construction) to the contingent remainder to the survivor of the testator's two sons, but not to the executory devise to his indefinite heirs.

"That section was first inserted in our law in the revision of 1845. That revision was not hastily prepared during a session of the General Assembly, and was not the work of laymen, but was the work of a commission of distinguished lawyers and jurists extending over a period of two years. They did not use technical words loosely or

without understanding; they did not mean an executory devise when they said remainder.

"In Harbison v. Swan, 58 Mo. 147, the will was very similar in form to the will in the case at bar. That case arose after the statute of 1845 went into effect, yet the court construed the will under the act of 1825 without reference to that of 1845, and the opinion was rendered by Judge Napton, who was one of the commission that made the revision of 1845.

"We hold that under the fourth clause of the will of Michael J. Gannon such an estate in the land in suit was devised to Michael J. Gannon, Jr., and Joseph E. Gannon, as would, under the common law, and the statute de donis, have been an estate tail to them and the heirs of their bodies, which by force of our statute section 4592, became a life estate in the two sons, Michael J., Jr., and Joseph E., with the remainder in fee to their children, the plaintiffs in this case.

"The judgment is, therefore, reversed, and the cause remanded to be retried according to the law as herein expressed.

"All concur."

If there is a Clear Gift of an Estate in Fee in a will, such estate cannot afterward be cut down except by something in the will which, with reasonable certainty, indicates the intention of the testator to cut it down or to defeat or to modify it: Yost v. McKee, 179 Pa. St. 381, 57 Am. St. Rep. 604. See, too, Mansfield v. Shelton, 67 Conn. 390, 52 Am. St. Rep. 285; Good v. Fichthorn, 144 Pa. St. 287, 27 Am. St. Rep. 630.

If an Interest in Land is Devised in Clear and absolute language, without words of limitation, the devise cannot be defeated by a subsequent doubtful provision of the will inferentially raising a limitation upon the prior devise: Bills v. Bills, 80 Iowa, 269, 20 Am. St. Rep. 418.

If a Devisee is Given an Absolute Fee, a limitation over is void because inconsistent with the absolute property given to the devisee first named: Combs v. Combs, 67 Md. 11, 1 Am. St. Rep. 359. See, too, Mansfield v. Shelton, 67 Conn. 390, 52 Am. St. Rep. 285; Bowen v. Bowen, 87 Va. 438, 24 Am. St. Rep. 664; Hall v. Palmer, 87 Va. 354, 24 Am. St. Rep. 653.

The Meaning of the Words "Dying Without Issue" is discussed in the note to Quackenbos v. Kingsland, 55 Am. Rep. 774-782; and the subsequent cases of Stevenson v. Fox, 125 Pa. St. 568, 11 Am. St. Rep. 922; McCormick v. McElligott, 127 Pa. St. 230, 14 Am. St. Rep. 837; Beilstein v. Beilstein, 194 Pa. St. 152, 75 Am. St. Rep. 692. In Combs v. Combs, 67 Md. 11, 1 Am. St. Rep. 359, it was held that the words "die without issue of his body lawfully begotten," in a will, must be construed to mean a definite failure of issue, and will support a limitation over, if other words in the will do not prevent this result.

PEARSELL MANUFACTURING COMPANY v. JEFFREYS.

[183 Mo. 386, 81 S. W. 901.]

GUARANTY—Acceptance and Notice Thereof.—Acceptance of an offer of guaranty, and notice of the acceptance, are necessary to complete the contract; yet they may be inferred if the circumstances justify the inference, or they may be waived if a purpose to do so appears in the terms of the offer itself or in the conduct of the parties. (p. 500.)

Frank W. Ashby and Paul D. Kitt, for the appellants.

Miller Bros., for the respondent.

388 VALLIANT, J. This suit was begun in a justice's court, taken by appeal to the circuit court, where there was a judgment for sixteen dollars and thirty-seven cents for the plaintiff, from which 389 the defendants appealed to the Kansas City court of appeals, where it was concluded that the judgment ought to be reversed and the cause remanded, but the judges of that court were of the opinion that their decision was in conflict with a decision of the St. Louis court of appeals, viz., Globe Ptg. Co. v. Bickley, 73 Mo. App. 499, and for that reason transferred the cause to this court for determination.

The suit is founded on an alleged contract in writing as follows:

"April 1, 1900, I, the undersigned agent for the Pearsell Manufacturing Company of Des Moines, Iowa, do hereby agree to remit amount due company of each order I buy of said company within thirty days after receiving said goods.

"MARY JEFFREYS, Agent.

"We the undersigned, have faith in the honesty and reliability of Mrs. Mary Jeffreys and will guarantee the payment of each bill of goods said Mrs. Jeffreys may buy of said Pearsell Manufacturing Company within thirty days after receiving goods.

Name.	Occupation.
"MR. GEORGE H. PARKER,	Cond'r. C. M. & St. P.
"LEWIS S. PRENTISS,	Real Estate Agent.
"F. W. ASHBY,	Real Estate Agent."

In the caption to the plaintiff's petition the style of the case is as follows: "Pearsell Manufacturing Co., Plaintiff, v. Mrs. Mary Jeffreys, Geo. H. Parker, Lewis S. Prentiss and F. W. Ashby, Defendants," but the contract declared on is not one alleged to have been made by Mrs. Jeffreys as principal and the other defendants as sureties, but it is the alleged contract of guaranty, and although Mrs. Jeffreys is named among the defendants in the caption, yet the petition states that she "is insolvent and suit against her would be unavailing." The answer begins: "Now this day come the defendants," etc., but the purport of it shows that it was intended [390] as the answer of the alleged guarantors only, and whilst the judgment is nominally against "the defendants," yet on the whole record it appears that Mrs. Jeffreys was ignored or overlooked, and the attorneys and court treated it as a suit against the alleged guarantors only, and so we will treat it, and when the word "defendants" is hereinafter used it will mean the alleged guarantors only.

The evidence for the plaintiff tended to show that the bill sued on was sent to the witness for collection, and he presented it for payment to the defendants Prentiss, Ashby and Parker, who admitted that they then knew that Mrs. Jeffreys had received the goods, but asked for time to enable them to try to collect it from her. Witness waited awhile, and then brought suit. Defendant Parker told witness that Mrs. Jeffreys was insolvent.

The evidence for defendants tended to prove that the body of the instrument sued on was a printed form sent out by the plaintiff, that it was presented to them by Mr. Parker, a son in law of Mrs. Jeffreys, with the request that they sign it. The paper in the form as presented to them called for payment for the goods within ten days from delivery, but they objected to that, as being too short a period, and interlined the paper to read thirty days, and then signed it, and returned it to Mr. Parker, and never saw or heard of it again until demand was made on them for payment of the bill sued on; they were never notified that the plaintiff had accepted their proposal to guarantee the payment of Mrs. Jeffrey's bill, or that any goods had been sold to her until the bill was presented to them for payment, a few days before the suit was brought; they denied that they acknowledged the debt or that they only asked time for payment.

The case was submitted to the court on the evidence, jury waived. There were no instructions asked or given. The result of the trial was as above stated.

391 The judgment in the case will depend on the answer to the question whether or not the written document and the attending circumstances constitute a complete contract of guaranty, or only a proposal which never became a contract. The circuit court took the view that it was a complete contract; the Kansas City court of appeals was of the opinion that the transaction never got beyond a mere proposal.

There was no evidence to show that between the time of the signing of the paper by the defendants and the day on which the bill was presented to them for payment, there had been any notice expressly given them that the plaintiff had accepted their guaranty.

It is as essential to a contract of guaranty, as it is to any other contract that both parties agree to it; a proposal never becomes binding on the proposer until it is accepted.

The cases referred to in the opinion of Judge Ellison for the Kansas City court of appeals in this case sustain this doctrine.

In Rankin v. Childs, 9 Mo. 665, it appeared that one McCourtney applied to the plaintiff for a bill of lumber and was told that security would be required; in a few days thereafter, he presented a bill of the lumber desired, signed by himself, and below his signature this: "I hereby guarantee the payment of the above bill. Wm. Childs." The lumber required was furnished to McCourtney on the bill, and Childs knew that it was furnished; he had no notice that his proposal to guarantee the payment of the bill had been accepted except such as might have been implied from the fact that the lumber was furnished and he knew it. There was no evidence that demand of payment had been made of McCourtney or that he was insolvent. The circuit court sustained a demurrer to the evidence and that judgment was affirmed. This court held that acceptance of the proposal to guarantee the bill and notice thereof were necessary to make it a binding obligation on 392 Childs, and in that connection, referring to the fact that Childs knew that the lumber was being furnished, the court said: "Whether that would constitute a sufficient notice of the acceptance of his guaranty, and that upon the faith thereof the plaintiffs were delivering the materials for the boat, ought to have been left to the jury." But the judgment was affirmed

on the ground that there was no evidence that a demand of payment had been made on McCourtney or that he was insolvent. The point in that decision directly bearing on the case at bar is, that acceptance of the proposal and notice thereof to the proposer are essential to complete the contract, but such acceptance and notice may be inferred if the circumstances justify the inference.

In Central Savings Bank v. Shine, 48 Mo. 456, 8 Am. Rep. 112, the defendant wrote a letter to the president of the bank asking him to submit to his board a proposition to loan O'Neil & Co. fifteen thousand dollars, and that if the bank would make the loan he would hold himself responsible for the payment, and concluded with this: "If the Central cannot conveniently make this advance, I will feel obliged to assist them in procuring it elsewhere." The court interpreted that to be a mere proposal and not binding until acceptance and notice. Indeed, the concluding clause in the letter is in effect an invitation for an answer.

In Taylor v. Shouse, 73 Mo. 361, a paper of character similar to that in question was signed by the defendants' intestate on March 29th; on the 30th he was taken ill, and on the 31st he was totally incapacitated for business, and on April 1st he died. The paper was mailed March 31st to plaintiff, who lived in Kansas. The court held that there was no evidence that the intestate had any notice that his proposal had been accepted and he was not bound. There was no room for an inference of a notice in that case.

In Deering Harvester Co. v. Sulser, 78 Mo. App. 670, the instrument sued on called for an acceptance and expressed that it was not binding until accepted.

[392] In Clinton Bank v. Goldstein, 86 Mo. App. 516, the proposal was to guarantee loans to the amount of two thousand dollars that the bank might make within certain dates. Several months after the proposal was signed, but within the dates named, the bank advanced the party between seven and eight thousand dollars. No notice of acceptance of the proposal had been given the defendant and he had no knowledge that the bank had made the loans. The trial court gave a peremptory instruction for the defendant and the judgment was affirmed.

Whilst those cases hold that acceptance and notice thereof are necessary to convert the proposal into a contract, they do not place contracts of this kind outside of the rule which applies to all contracts, not wholly in writing, that the contract

itself or an essential feature thereof may be inferred if the circumstances justify the inference.

In Parsons on Contracts it is said: "The contract of guaranty, like every other contract, implies two parties, and requires the agreement of both parties to make it valid. In other words, a promise to pay the debt of another is not valid unless it is accepted by the promisee. Language is sometimes used by courts and legists which might seem to mean that there were cases of guaranty which need not be accepted; but this is not accurate; there are cases in which the acceptance is implied and presumed; but there must be acceptance or assent, expressed or implied, or there can be no contract. . . . . The principle which underlies the whole law of guaranty is that this contract, like every other, must be known to the parties to it. Still, this knowledge need be only a reasonable knowledge; and we understand the courts which hold that notice of acceptance is not always necessary, to mean only, that where an offer to guarantee is absolute, and contains in itself no intimation of desire for specific notice of acceptance, it may be supposed that the offerer has a reasonable knowledge that his guaranty is accepted and acted upon unless he is [394] informed to the contrary": 2 Parsons on Contracts, 9th ed., *12.

In a note to the text is a very learned discussion of the subject and review of the decisions by the editor, in which he says: "Every contract does not need notice of acceptance. Upon performance of the act requested in the offer of a unilateral contract the obligation of the offerer becomes complete, the performance itself indicating acceptance. . . . . And such an offer may be addressed to the public generally, as an offer of reward usually and a letter of credit frequently is."

Holding now, as this court has always held, that acceptance and notice in such case are necessary, yet we also hold that acceptance and notice may be inferred if the circumstances justify the inference, or they may be waived if a purpose to do so appears in the terms of the offer itself or in the conduct of the parties.

Let us now turn to the facts of the case in hand. Here was a printed form of a contract sent out by the plaintiff to a prospective customer. It is clumsily drawn, confusing the character of agent with that of purchaser, yet it carries the idea that Mrs. Jeffreys is to buy goods on a credit of thirty days and the payment is to be guaranteed by her friends, she is to sign it in one part and they in another part. The

natural inference is that when signed it is to be returned to the plaintiff and if satisfactory the goods will be furnished. There is nothing on the face of the paper inviting an answer and nothing in the nature of the business to suggest that an answer is expected. These defendants furnished Mrs. Jeffreys with this document for the purpose of having her present it to the plaintiff and obtain goods on the faith of it; they heard nothing of it afterward, and made no inquiry about it; they doubtless inferred that it had been accepted and acted upon and the circumstances of the case justified that inference.

But there is another fact in this case that bears on [395] the question of the knowledge of these defendants as to the transactions between the plaintiff and Mrs. Jeffreys based on the faith of the document. There were no negotiations between these defendants personally and the plaintiffs as was the case in Bank v. Shine above quoted. Their transaction with the plaintiff was through Mrs. Jeffreys. They signed the paper and gave it to her, or to her son in law for her. All the communication they ever had with the plaintiff was through her, and, therefore, when she came to the plaintiff accredited by these defendants to present a proposition of guaranty, the plaintiff had a right to return its answer to them through the same agency, and defendants are chargeable with notice of what occurred thereupon between the plaintiff and Mrs. Jeffreys. The paper was designed to induce the plaintiff to sell goods to Mrs. Jeffreys on a credit of thirty days; the natural inference is that it was given to her to be by her presented to the plaintiff and obtain goods on the faith of it. She made the use of it that these defendants must have expected that she would make, and the plaintiff acted upon it as the defendants must have expected it would act. The defendants' proposition came to the plaintiff through the person whom they authorized to carry it, the answer was given by the plaintiff to that person, and the natural inference is that the answer reached the defendants through the agency of their own choice. Whether the circumstances justify the inference is a question for the trier of the facts, as was said in Rankin v. Childs, 9 Mo. 665, in this case the finding of the trial court is sustained by the evidence, and is conclusive on that point.

The judgment of the circuit court is affirmed.

All concur.

THE CONTRACT OF GUARANTY.*

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I. Defined and Distinguished from Other Contracts.

a. Guaranty Defined.—A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself, in the first instance, liable to such duty or performance: Cowan v. Roberts, 134 N. C. 415, 101 Am. St. Rep. 845, 46 S. E. 979, 65 L. R. A. 729. See, too, Gridley v. Capen, 72 Ill. 11; Mathews v. Chrisman, 12 Smedes & M. 595, 51 Am. Dec. 124; McLaren v. Watson, 26 Wend. 425, 435, 37 Am. Dec. 260; Tidioute Sav. Bank v. Libbey, 101 Wis. 193, 70 Am. St. Rep. 907, 77 N. W. 182. Or, as defined in Clanin v. Esterly Harvesting Machine

*REFERENCE TO MONOGRAPHIC NOTE.

Guaranty of collection: 64 Am. St. Rep. 393-403.

Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863, a guaranty is an independent contract, by which the guarantor undertakes, in writing, upon a sufficient undertaking, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person who is primarily liable to pay or perform. From these definitions, then, it appears that the contract of guaranty is strictly conditional: Kramph v. Hatz, 52 Pa. St. 525, 529; Burnham v. Gallentine, 11 Ind. 295.

b. **Guaranty Illustrated.**—The following writings have been held to amount to guaranties: A letter addressed to a lumber dealer: "Please send my son the lumber he asks for, and it will be all right" (Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572). A letter introducing a merchant: "Any favor you may show him in introducing him to the different houses, so that he may be able to fill his orders, will be highly appreciated by him, and will be indorsed by me for the amount of his purchases" (Wheeler v. Mayfield, 31 Tex. 395, 98 Am. Dec. 545). A letter written by a person to merchants with whom he has been in the habit of dealing, introducing his brother, stating that the brother was going to their city to buy goods and requesting them to introduce him to some of the houses at which the writer dealt, "with assurance that any contract of his will and shall be promptly paid" (Moore v. Holt, 10 Gratt. 284). A letter, "We consider E. good for all he may want of you, and we will indemnify the same" (Whitney v. Groot, 24 Wend. 82).

On the other hand, the following writings do not amount to guaranties: "This will introduce to you F., who is in want of money. Whatever he tells you, you may rely on it" (Baker v. Trotter, 73 Ala. 277). "Let M. have what goods he may want on four months, and he will pay as usual" (Eaton v. Mayo, 118 Mass. 141). "We would say that the contract is good, and that we will look after the same both to your interest and for our own," being the reply from a broker to inquiries of a buyer of goods respecting the responsibility of the seller (Kenneweg Co. v. Finney, 98 Md. 114, 56 Atl. 482). "You may rest assured that you will get your pay for all work done," being a letter from the lessor of land to a person contemplating the rendition of services to the lessee (Switzer v. Baker, 95 Cal. 539, 30 Pac. 761).

c. **Guaranty Distinguished from Suretyship.**—The difference between the contract of a guarantor and the contract usually entered into by a surety is, that in case of a guarantor, the promise of the person secondarily liable is a collateral promise to pay, in case default is made by one who is primarily liable for the thing guaranteed, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable: Welch v. Walsh, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440, 52 L. R. A. 782. See, too, Geary v. O'Neil, 73 Ill. 593; Read v. Cutts, 7 Me. 186, 22 Am. Dec. 184; Clark v. Howard, 150 N. Y. 232, 44 N. E. 695. "A

contract of suretyship is a direct liability to the creditor for
to be performed by the debtor, and a guaranty is a liability o
his ability to perform the act. In the former, the surety assu
perform the contract of the principal debtor if he should not,
the latter the guarantor undertakes that his principal can per
that he is able to do so. From the nature of the former, the
taking is immediate and direct that the act shall be done wh
not done, makes the surety responsible at once, but from the na
the latter, nonliability, in other words, insolvency, must be
. . . . The contract of a guarantor is to be carefully disting
from that of a surety, for while both are accessory contracts, ar
of a surety in some sense conditional as that of a guaran
strictly so, yet mere delay to sue the principal debtor does n
charge a surety. The surety must demand proceedings with
that he will not continue bound, unless they are instituted.
contract he undertakes to pay if the debtor does not—the gua
undertakes to pay if the debtor cannot. The one is an insurer
debt; the other an insurer of the solvency of the debtor. It
as a matter of course out of the latter contract that the creditor
use diligence to make the debtor pay, and failing in this, he
the guarantor'': Campbell v. Sherman, 151 Pa. St. 70, 31 Am. S
735, 25 Atl. 35.

''A surety binds himself to perform if the principal do
without regard to his ability to do so. His contract is equa
solute with that of his principal. They may be sued in the sa
tion, and judgment may be entered up against both. A guaran
the other hand, does not contract that the principal will pa
simply that he is able to do so; in other words, a guarantor wa
nothing but the solvency of the principal. Before an action
maintained against a guarantor, therefore, it must be shown th
principal is unable to perform. The surety says to the credit
your debtor will not pay, I will pay.' The guarantor says t
'Proceed first against the principal, and, if he should not be
pay, then you may proceed against me' '': Manry v. Waxelbau
Ga. 14, 33 S. E. 701.

This question of the distinction between a contract of surety
contract of guaranty has been thoroughly considered by the I
courts, and the following extracts from the decisions of that st
instructive. Said Justice Coffey in Nading v. McGregor, 12
465, 23 N. E. 283, 6 L. R. A. 686: ''It is often a question o
great difficulty to determine whether a particular instrument o
ing constitutes a strict guaranty, or whether it constitutes an o
undertaking. In a strict guaranty the guarantor does not und
to do the thing which his principal is bound to do, but his obli
is that the principal shall perform such act as he is bound to pe
or in the event he fails, that the guarantor will pay such dama
may result from such failure. It is this feature which enable

distinguish a strict or collateral guaranty from a direct undertaking or promise. So that when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is said to be an original undertaking, and not a strict or collateral guaranty. In the later class of contracts the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of his principal."

And Chief Justice New, in considering this question in Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. 160, said: "The contract of a guarantor is, in strictness, his own separate contract, and is collateral to that of the principal. Strictly speaking, the guarantor does not undertake to do the very thing which his principal is bound to do. It is rather in the nature of the warranty that the thing which the principal ought to do will be done, and in the event the principal fails, the guarantor will himself thereafter answer for such failure. A guarantor answers for the default of his principal, while a surety is responsible at once on his direct promise to pay. A guarantor, unlike a surety, cannot, as a general rule, be sued with his principal, inasmuch as his liability arises strictly from his individual contract. A contract or undertaking of guaranty may, however, be so worded as to be a direct and absolute engagement to pay, and not collateral; and, although when a contract of guaranty takes that form it is, in a sense, in the nature of suretyship, it is not a contract of suretyship in such a sense as to be irrevocable." These utterances have been approved in Shearer v. Peale, 9 Ind. App. 282, 36 N. E. 455; Durand v. Rockwell, 23 Ind. App. 11, 54 N. E. 771; Newcomb Bros. Wall Paper Co. v. Emerson, 17 Ind. App. 482, 46 N. E. 1018; Walter A. Wood Mowing etc. Co. v. Farnham, 1 Okla. 375, 33 Pac. 867.

Indorsing a note, "I guarantee the payment of the within note," makes the party a guarantor, and not a surety: Oxford Bank v. Haynes, 8 Pick. 423, 19 Am. Dec. 334; but indorsing a note, "I hereby acknowledge to be security for the within amount until paid by A," makes the party a surety: Marberger v. Pott, 16 Pa. St. 9, 55 Am. Dec. 479. An agreement at the foot of a lease: "For consideration received, I hereby agree to become security for the faithful performance of the above agreement," is a contract of suretyship: Allen v. Hubert, 49 Pa. St. 259. So is a bond by which the obligors bind themselves for the payment by the principal of all claims owing by him to the obligee: Page v. White Sewing-Machine Co., 12 Tex. Civ. App. 327, 34 S. W. 988; and so is an undertaking to "stand surety" for another: Watson v. Beabout, 18 Ind. 281. A writing, "Please send A goods to the amount of one hundred dollars, and I will guarantee the same in four months," is a guaranty: Dole v. Young, 24 Pick. 250; Weikle v. Minneapolis etc. Ry. Co., 64 Minn. 296, 66 N. W. 963.

d. Distinguished from Indemnity.—There is an obvious portant difference between a contract of guaranty and a of indemnity. The former is a collateral undertaking and poses some contract or transaction to which it is collatera the latter is essentially an original contract, and not wit statute of frauds: Anderson v. Spence, 72 Ind. 315, 37 Am. R In Redfield v. Haight, 27 Conn. 31, where A agreed in wr assume and pay certain debts of B, and C executed a collate tract upon the same paper in the following terms: "In consi of one dollar to me in hand paid, I hereby guarantee the fair performance of the covenants and agreements mentione foregoing instrument on the part of A," it is held that the of C is not a mere contract of indemnity, but an absolute g But in Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218, a con shareholders to protect one of their number from an indorse the corporation's paper, is held to be a contract of indemn not of guaranty.

e. Distinguished from Warranty.—The distinction betwe anty and warranty is pointed out in Sturges v. Bank of Ci 11 Ohio St. 153, 78 Am. Dec. 296, in the following langua guaranty in its strict legal and commercial sense, is said to undertaking by one person to be answerable for the pay some debt, or the due performance of some contract or duty other person who himself remains liable to pay or perform t . . . . Originally, the words "warranty" and "guaranty" same, the letter "g" of the Norman French being convertil the "w" of the German and English; as in the name of "W or "Guillaume." They are now sometimes used indiscriminat in general, warranty is applied to a contract as to the title, or quantity of a thing sold; and guaranty is held to be the by which one person is bound to another for the fulfillme promise or engagement of a third party': 1 Parsons on Contra Each is, alike, an undertaking by one party to another to in or make good the party assured against some possible defaul fect in the contemplation of the parties. A guaranty is, always understood, in its legal and commercial sense, as a c warranty, and often as a conditional one, against some de event in future. The term 'warranty,' on the other hand, erally understood as an absolute undertaking in praesenti as in futuro, against the defect, or for the quantity or qual templated by the parties in the subject matter of the contra this contract of warranty, whether qualified and collateral, plied to the performance of a duty, payment of a debt, or ha of an event, when denominated a guaranty, or unqualified solute, as in cases of warranty when applied to the quality of things, has alike, in either case, all the characteristics o tract or undertaking. It must be supported by a sufficient

eration; it must appear to be an agreement of the minds of the two contracting parties to the proposition constituting the contract. The same remark is also equally applicable to each—that no particular form of words is required to express the contract. Any form of words expressing an undertaking, upon a consideration, to insure the other party against the nonpayment or delinquency of a third party may constitute a guaranty. And any affirmation or words, sustained by a consideration, showing an undertaking that the quality or title of the thing sold is such as represented, may amount to a warranty. The consideration in each case may arise out of the transaction. In the case of a guaranty, that it was operative to cause the negotiation or acceptance of the paper, and in that of a warranty, that the affirmation or undertaking was operative in causing the purchase, would in each case be a sufficient consideration."

f. **Distinguished from Indorsement.**—The undertaking of a guarantor and that of an indorser are materially different. The contract of both is conditional, but the conditions are unlike. The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security: First Nat. Bank v. Babcock, 94 Cal. 96, 28 Am. St. Rep. 94, 29 Pac. 415. Moreover, the contract of a guarantor is more onerous than that of an indorser. "The indorser," says Mr. Daniel, "contracts to be liable only upon condition of due presentment of the bill or note on the exact day of maturity, and due notice to him of its dishonor. And he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made and notice given to him of dishonor, within a reasonable time. And in the event of a failure to make presentment and give notice within a reasonable time, he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay. The same person may be guarantor, and also indorser of a note; and in such a case, while failure to give due notice of demand and nonpayment will discharge him as indorser, he will be bound as guarantor": 2 Daniel on Negotiable Instruments, sec. 1754, citing Arents v. Commonwealth, 18 Gratt. 770; Castle v. Rickly, 44 Ohio St. 490, 58 Am. Rep. 839, 9 N. E. 136; Burrow v. Zapp, 69 Tex. 476, 6 S. W. 783; Deck v. Works, 57 How. Pr. 292. See, too, "Notice of Default," post.

II. Execution and Essentials of Contract.

a. Consideration for Guaranty.

1. **Necessity for Consideration.**—A consideration is essential to a valid contract of guaranty; a guaranty without consideration cannot be enforced: Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297; Cowles v. Pick, 55 Conn. 251, 3 Am. St. Rep. 44, 10 Atl. 569; Richner v. Kreuter, 100 Ill. App. 548; Fuller v. Scott, 8 Kan. 25; Lane v. Richards, 119 Iowa, 24, 91 N. W. 786; Evansville Nat. Bank v. Kaufmann,

93 N. Y. 273, 45 Am. Rep. 204; Decker v. Hammond, 63 H
17 N. Y. Supp. 645. The consideration, however, need not pass
from the party receiving the guaranty to the party giving i
the party for whom the guaranty is given receives a benefit
party to whom it is given receives an injury, in consequence
guaranty and as its inducement, this is a sufficient consider
Adams v. Huggins, 78 Mo. App. 219, quoting from 2 Parsons
tracts, p. 7. See, also, McDougald v. Argonaut Land etc.
Cal. 87, 48 Pac. 1021; Winans v. Gibbs, 48 Kan. 777, 30 P
Whatever would be sufficient as a consideration in the case
other kind of contract is sufficient in case of a guaranty: V
v. Marshall, 42 Barb. 524. A valuable consideration, thoug
or nominal, if stipulated for in good faith, is sufficient: L
v. McCalmont, 43 U. S. (2 How.) 426, 11 L. ed. 326. It is
essary that the consideration should be full or adequate; a
consideration is sufficient: Cowan v. Roberts, 134 N. C. 415,
St. Rep. 845, 46 S. E. 979, 65 L. R. A. 729.

2. **Existence of Valid Principal Obligation.**—If a guaranty
sidered as a collateral undertaking, it follows that to give it
there must ordinarily be a principal obligation. If there is
cipal obligation, or if the supposed one is void, then the g
is of no validity and effect: Kilbride v. Moss, 113 Cal. 432,
St. Rep. 361, 45 Pac. 812; Parrish v. Rosebud Min. etc. Co.
71 Pac. 694; Bennett v. Carey, 72 Iowa, 476, 34 N. W. 291;
Sav. Bank v. Strother, 22 S. C. 552. Thus, a guaranty of a v
is also void (Smith v. Dickinson, 6 Humph. 261, 44 Am. De
and the guarantor of a draft is not liable if the drawee ri
refuses to accept it and is not liable thereon: Merchants' Na
v. Citizens' State Bank, 93 Iowa, 650, 57 Am. St. Rep. 284, 6
1065. But it seems that a guaranty of negotiable paper dis
by a national bank is not rendered void by the fact that th
demanded and received usurious interest upon the paper: L
National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

It would seem, however, that if the contract is an agreem
tinct and separate from the principal undertaking, that it
enforceable, notwithstanding the principal obligation is not
v. Jamieson, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846; Zabr
Cleveland etc. R. R. Co., 64 U. S. (23 How.) 381, 16 L. ed. 4
if guaranty collateral to the principal contract is executed
quently to the execution of the principal contract, and rest
an independent consideration, the general rule that whatever
the contract unenforceable against the principal obligor will
it unenforceable against his guarantor does not apply: Ne
Hinchman, 118 Fed. 435, 55 C. C. A. 251, citing Veazie v. W
Mass. (6 Gray) 90; Jones v. Thayer. 78 Mass. (12 Gray)
Am. Dec. 602; Sedalia etc. Ry. Co. v. Smith, 27 Mo. App. 37

Purdy v. Peters, 35 Barb. 239, 248; Remsen v. Graves, 41 N. Y. 472; Mason v. Nichols, 22 Wis. 376.

3. Principal Contract as Consideration.

A. For Contemporaneous Guaranty.—Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also; a separate and distinct consideration is not necessary to sustain the guaranty: Rich v. Hathaway, 18 Ill. 548; Jones v. Kuhn, 34 Kan. 414, 8 Pac. 777; Heyman v. Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257; Deshon v. Dyer, 86 Mass. (4 Allen) 128; Leonard v. Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317; Erie Co. Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54; Cahill Iron Works v. Pemberton, 62 N. Y. Supp. 944, 48 App. Div. 468, affirmed in 168 N. Y. 649, 61 N. E. 1128; Green v. Thornton, 49 N. C. (4 Jones) 230; In re Smith Lumber Co., 132 Fed. 620. If the guaranty is executed subsequently to the signing of the principal contract, still it will be deemed to have been made contemporaneously with it, where the two are delivered at the same time: Kennedy etc. Lumber Co. v. S. S. Construction Co., 123 Cal. 584, 56 Pac. 457; Garland v. Gaines, 73 Conn. 662, 84 Am. St. Rep. 182, 49 Atl. 19; Heintz v. Cohn, 29 Ill. 308. The general rule, as stated in Highland v. Dresser, 35 Minn. 345, 29 N. W. 55, is this: "When the contract of guaranty is entered into contemporaneously with the principal contract, and is either incorporated in the latter, or so distinctly refers to it as to show that the agreements are parts of an entire transaction, no consideration need be expressed in the guaranty distinct from that expressed in the principal contract. In such case the consideration of the guaranty is apparent upon the face of the whole agreement, and that is enough."

Where a guaranty is put upon a note at the time of its execution or prior to its delivery, and so is a part of the original transaction, no new consideration is necessary to support it: Dillman v. Nadelhoffer, 160 Ill. 121, 43 N. E. 378; Wentworth v. Read, 166 Ill. 139, 46 N. E. 777; Winans v. Gibbs, 48 Kan. 777, 30 Pac. 163; Osborne v. Gullikson, 64 Minn. 218, 66 N. W. 965; Gagan v. Stephens, 4 Utah, 348, 9 Pac. 706. And where a guaranty for the payment of rent is made a part of the lease, by indorsement or otherwise, the consideration for the lease is also the consideration of the guaranty: McDonald v. Harris, 75 Ill. App. 111; Bullen v. Morrison, 98 Ill. App. 669; Highland v. Dresser, 35 Minn. 345, 29 N. W. 55.

B. For Subsequent Guaranty.—But if a guaranty is so long subsequent to the execution of the contract guaranteed that it cannot be said to be a part of the original transaction, the consideration for the principal contract will not support the guaranty. In such a case there must be a new and independent consideration: Joslyn v. Collinson, 26 Ill. 62; Haven v. Chicago Sash etc. Co., 96 Ill. App.

92; Ware v. Adams, 24 Me. 177; Gilman v. Kibler, 24 Tenn. (5 Hu
19; Rattemiller v. Stone, 28 Wash. 104, 68 Pac. 168. This
applied to a guaranty of the performance by a lessee of the
of his lease in Bullen v. Morrison, 98 Ill. App. 669, and to a gu
of the payment of a promissory note in Holmes v. Williams,
App. 114; Greer v. Jones, 52 N. C. (7 Jones) 581; Baker v. Wah
5 Tex. Civ. App. 268, 23 S. W. 1023; White v. White, 30 Vt.

Still, when a guaranty, although executed after the principa
was created is in pursuance or fulfillment of a previous agr
upon the faith of which credit was given, it requires no new
dependent consideration: Sawyer v. Fernald, 59 Me. 500; Stan
Miles, 36 Miss. 434. See, too, Roberts v. Woven-Wire Mattre
46 Md. 374; Gottsberger v. Radway, 2 Hilt. 342. Thus, it i
that a person not a party to a promissory note is liable who,
its delivery to the payee, places his name upon it in pursuance
agreement made by him with the payee before the making
note: Sawyer v. Fernald, 59 Me. 500, 503, citing Klein v. Curr
Ill. 237; Leonard v. Wilds, 36 Me. 265.

4. **New and Original Consideration.**—Chancellor Kent said
in respect to the consideration for contracts of guaranty, the
"three distinct classes of cases, which require to be discrimi
1. Cases in which the guaranty or promise is collateral to the
cipal contract, but is made at the same time, and becomes
sential ground of the credit given to the principal or direct
Here, as we have already seen, is not, nor need be, any othe
sideration than that moving between the creditor and the o
debtor; 2. Cases in which the collateral undertaking is subsequ
the debt, and was not the inducement to it, though the sub
liability is the ground of the promise, without any distinct a
connected inducement. Here must be some further conside
shown, having an immediate respect to such liability, for th
sideration for the original debt will not attach to this subs
promise; 3. A third class of cases, and to which I have alrea
luded, is when the promise to pay the debt of another arises
some new and original consideration of benefit or harm movi
tween the newly contracting parties": Leonard v. Vredenbu
Johns. 29, 5 Am. Dec. 317. This classification is approved in
v. Browning, 68 S. C. 13, 46 S. E. 545. See, too, Hall v. Rog
Humph. 536, where the rule as stated above in class three is a

5. **Forbearance.**—A promise to extend the time for payme
debt, or a promise to forbear to sue the debtor, although no d
term of extension or forbearance is specified, followed by an
forbearance for a reasonable period, will be a sufficient cons
tion to support a guaranty by a third person to pay the debt
Micken v. Safford, 197 Ill. 540, 64 N. E. 540; Fuller v. Scott, 8
25; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; King v. Upton,

387, 16 Am. Dec. 266; Calkins v. Chandler, 36 Mich 320, 24 Am. Rep. 593; Peterson v. Russell, 62 Minn. 220, 54 Am. St. Rep. 634, 64 N. W. 555, 29 L. R. A. 612; Hockenbury v. Meyers, 34 N. J. L. 346; Faulkner v. Gilbert, 57 Neb. 544, 77 N. W. 1072; Thomas v. Croft, 2 Rich. 113, 44 Am. Dec. 279; Armstrong v. Snyder, 15 Tex. Civ. App. 394, 39 S. W. 379; Dahlman v. Hammel, 45 Wis. 466. And it is not necessary that the creditor should discharge the debtor, or relinquish his securities and liens: Brownell v. Harsh, 29 Ohio St. 631. For example, a promise to forbear suit and to give further time for the payment of a note, though the time to be given is not made definite, is a sufficient consideration for the guaranty of the note by a third person, if it is followed by an actual forbearance for a reasonable time: Moore v. McKinney, 83 Me. 80, 23 Am. St. Rep. 753, 21 Atl. 749.

Forbearing to eject a tenant whose rent is in arrear is a good consideration for a guaranty to pay the past and future rent: Vinal v. Richardson, 95 Mass. (13 Allen) 521. An agreement to withdraw a suit on a note is sufficient consideration for the guaranty of the note: Worcester etc. Sav. Bank v. Hill, 113 Mass. 25. And an agreement to stay execution is a good consideration for a promise to pay the debt of another: Giles v. Ackles, 9 Pa. St. 147, 49 Am. Dec. 551. So is the release of an attachment: Savage v. Robinson, 93 Me. 262, 44 Atl. 926. But a forbearance to levy an attachment, or to institute bankruptcy proceedings, when there is no valid ground therefor, is not a sufficient consideration: Ecker v. Bohn, 45 Md. 278; Smith v. Eastern, 54 Md. 138, 39 Am. Rep. 355. See, too, Rood v. Jones, 1 Doug. (Mich.) 188. Compare, however, Saxton v. McNair, 71 Wis. 459, 37 N. W. 439, where the consideration of a guaranty for the payment of damages done by cattle was their release after being distrained under proceedings technically defective.

While it is true that an agreement on the part of a creditor for general indulgence toward his debtor, without the specification of any definite time, followed by actual forbearance for a reasonable time, is a sufficient consideration for a guaranty of the debt, it is equally true that a forbearance without an agreement on the part of the creditor to forbear is not deemed a sufficient consideration: Webbe v. Romona Oolitic Stone Co., 58 Ill. App. 222; Hoffmann v. Mayaud, 93 Fed. 171, 35 C. C. A. 256. Thus, mere forbearance to sue the maker of a note, there being no agreement to that effect on the part of the holder, is not a good consideration for a guaranty of the note: McCorney v. Stanley, 62 Mass. (8 Cush.) 85.

6. **Giving of Credit and Delivery of Goods.**—The delivery of goods, upon the faith of a guaranty that they shall be paid for, is a consideration sufficient to support the guaranty: Hirsch v. Chicago Carpet Co., 82 Ill. App. 234; Lamb v. Briggs, 22 Neb. 138, 34 N. W. 217; Young v. Brown, 53 Wis. 333, 10 N. W. 394. See, too, Cowan v. Roberts, 134 N. C. 415, 101 Am. St. Rep. 845, 46 S. E. 979, 65 L. R.

A. 729. And, generally, a consideration sufficient to sustain anty for the faithful performance of his undertaking by tl cipal exists when the person for whose protection the guara given has extended credit on the faith of such credit: Linin Co. v. Wheat, 49 Neb. 567, 68 N. W. 941. It is not necessar over, that exclusive reliance be placed on the guaranty of person to pay the debt of another; it is sufficient that the c extended on the faith of the guaranty: McDonald v. Tootl ley Millinery Co., 64 Neb. 577, 90 N. W. 547. "It has been inv held that where a promise that a guarantor will become liable of the inducement on which the creditor acts in creating the debt, this is a sufficient consideration to support the contract guarantor, who subsequently signs. The credit given to tl cipal debtor forms the consideration for the guaranty": V v. Wise, 19 Misc. Rep. 659, 44 N. Y. Supp. 510.

7. **Other Considerations.**—If a guaranty for the perform the covenants of a lease is executed contemporaneously therew is an essential ground of the credit extended to the lessee, sufficient consideration for the contract of guaranty: Gar Gaines, 73 Conn. 662, 84 Am. St. Rep. 182, 49 Atl. 19. See, too, v. Bean, 12 Mass. 137, 7 Am. Dec. 44; Roth v. Adams, 185 Ma 70 N. E. 445; Macfarland v. Heim, 127 Mo. 327, 48 Am. St. R 29 S. W. 1030. The release of a substantial security for the p of a debt in consideration of the guaranty of a third pers sufficient consideration to uphold the contract of guaranty: v. Ashley, 24 Ark. 511, 91 Am. Dec. 519. See, also, Home Sa v. Hosie, 119 Mich. 116, 77 N. W. 625. A guaranty to an in for a board bill, on the faith of which he allows a guest t the inn without insisting upon or enforcing his rights, is su by a sufficient consideration: McKee v. Needles, 123 Iowa, N. W. 618. A promise by men to work for a subcontracto stated time is a consideration sufficient to sustain a promise principal contractor to be responsible for their pay: McDo Fernald, 68 N. H. 171, 38 Atl. 729. Commissions allowed to a are a sufficient consideration for his guaranty of promissor taken by him in payment: Newton Wagon Co. v. Diers, 10 N 4 N. W. 995.

b. **Signature and Delivery.**—It is clear that to constitute guaranty, there must be a delivery by the guarantor: March ney, 56 N. H. 34. See, too, Belleville Sav. Bank v. Borman N. E. 686. Upon its delivery the guaranty as a rule, becomes e In this connection it becomes important to determine what a to a delivery, and this question sometimes occurs where th antor's signature and his delivery of the instrument are cond Thus, a verbal promise may be made that a guaranty for t ment of rent shall not be delivered until the lessor consents

insertion in the case of a provision for the reduction of rent. In such a case, if the guaranty is delivered with nothing to suggest the existence of such condition, the guarantor is nevertheless bound: Seitz Brewing Co. v. Ayres, 60 N. J. Eq. 190, 46 Atl. 535.

Numerous cases arise where a surety signs a bond on the condition that others shall also sign. If a surety signs an official bond and leaves it in the hands of the principal to be delivered only on the condition that it be signed by another surety, and the principal delivers the bond to the obligee without complying with such condition, the surety is not bound if the obligee has notice, actual or constructive, of the conditional agreement; if, however, the bond on its face is complete, and the obligee has no notice of the understanding between the principal and surety, nor information sufficient to put him on inquiry, the surety is bound: See the monographic note to Estate of Ramsay v. People, 90 Am. St. Rep. 194. Practically the same rule applies, it would seem, where a guarantor signs on the condition that others shall also sign the contract, and the guaranty is delivered in violation of the condition. If the person who relies on the guaranty is not chargeable with notice of such condition, the guarantor will ordinarily be bound; but if such person is chargeable with notice, then the guarantor is not bound: Belleville Sav. Bank v. Bornman, 124 Ill. 200, 16 N. E. 210; Kline v. Raymond, 70 Ind. 271; Markland Min. etc. Co. v. Kimmel, 87 Ind. 560; Cowan v. Roberts, 134 N. C. 415, 101 Am. St. Rep. 845, 46 S. E. 979, 65 L. R. A. 729; State Bank v. Burton-Gardner Co., 14 Utah, 420, 48 Pac. 402; New Home Sewing-Mach. Co. v. Simon, 104 Wis. 120, 80 N. W. 71.

c. Acceptance of Guaranty.

1. **Necessity of Acceptance.**—It is essential to a contract of guaranty that there be an offer and an acceptance, express or implied. The contract is not consummated until there is a mutual assent and a meeting of minds: See the principal case, ante, p. 496. "A contract of guaranty," to quote from Davis Sewing-Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. Rep. 173, 29 L. ed. 480, "can be made only by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." A mere proposition to

guarantee is clearly not operative as a guaranty unless acc
Farmers' Bank v. Tatnall, 7 Houst. 287, 31 Atl. 879; Sears v.
66 Ill. App. 496; Deering Harvester Co. v. Sulser, 78 Mo. App
Fellows v. Prentiss, 3 Denio, 512, 45 Am. Dec. 484; Carter v. W
(Tex. Civ. App.), 29 S. W. 1102.

2. **Necessity of Notice of Acceptance.**—Moreover, an offer of
anty does not become binding without notice to the guaran
the acceptance of the offer by the guarantee. If a guaranty
visional prospective, contingent, or conditional—if, in short, i
be construed as a mere offer or proposition to guarantee—th
tice of its acceptance is necessary to complete the contract.
very satisfactory and conclusive reasons are given for this g
rule. The first is, that the so-called guaranty is a mere of
proposition, and is not complete until the party making the o
notified of its acceptance, when the minds of the parties mee
the contract is completed. The second is, that the party m
the offer is entitled to know whether or not his offer has be
cepted, that he may know his responsibility, and so regulate his
of conduct toward the principal debtor that he may not suffer
Saint v. Wheeler etc. Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 2
South. 539; Wanamaker v. Benn, 3 Penne. (Del.) 188, 50 Atl
Barnes Cycle Co. v. Schofield, 111 Ga. 880, 36 S. E. 965; Taus
Reid, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918; Stew
Knight (Ind. App.), 71 N. E. 182; German Sav. Bank v. Drake
ing Co., 112 Iowa, 184, 84 Am. St. Rep. 335, 83 N. W. 960, 51 L.
758; Gano v. Farmers' Bank, 103 Ky. 508, 82 Am. St. Rep. 5
S. W. 519; Greer Machinery Co. v. Sears, 23 Ky. Law Rep.
66 S. W. 521; Gregory v. Bullock, 120 N. C. 260, 26 S. E. 820
v. Buehler, 110 Pa. St. 366, 5 Atl. 20; Gardner v. Lloyd, 110 P
285, 2 Atl. 562; Acme Mfg. Co. v. Reed, 197 Pa. St. 359, 80 A
Rep. 832, 47 Atl. 205; Barnes Cycle Co. v. Reed, 84 Fed. 603.

But if, instead of an offer of guaranty, a positive, absolute an
conditional guaranty is given, then the guarantor is bound witho
press notice of acceptance: Stewart v. Sharp County Bank, 71
585, 76 S. W. 1064; London etc. Bank v. Parrott, 125 Cal. 472, 7
St. Rep. 64, 58 Pac. 164; Scribner v. Schenkel, 128 Cal. 250, 60
860; Manry v. Waxelbaum, 108 Ga. 14, 33 S. E. 701; Frost v. Sta
Metal Co., 215 Ill. 240, 74 N. E. 139; Bryant v. Stout, 16 Ind.
380, 44 N. E. 68, 45 N. E. 343; Wheeler v. Roher, 21 Ind. App. 4
N. E. 780; Bankers' Iowa State Bank v. Mason Hand Lathe Co
Iowa, 570, 97 N. W. 70, 90 N. W. 612; McKee v. Needles, 123
195, 98 N. W. 618; White Sewing-Machine Co. v. Powell, 25 Ky.
Rep. 94, 74 S. W. 746; Louisiana etc. R. R. v. Dillard, 51 La. Ann.
26 South. 451; Lininger v. Wheat, 49 Neb. 567, 68 N. W. 941; C
v. Roberts, 134 N. C. 415, 101 Am. St. Rep. 845, 46 S. E. 979,
R. A. 729; Shropshire v. Smith (Tex. Civ. App.), 37 S. W. 174;
v. Wells, 104 U. S. 159, 26 L. ed. 686; Silver v. Kent, 105 Fed. 8

The difficulty, however, is to determine what is a guaranty and what an offer of guaranty. In discussing this question in Standard Sewing-Machine Co. v. Church, 11 N. Dak. 420, 92 N. W. 805, Justice Young said: "The reason for requiring notice of acceptance of an offer of guaranty to be communicated to the guarantor is, that without acceptance and notice of acceptance there is not that mutual consent necessary to the existence of a contract, or, in other words, there is no contract of guaranty. The true test, we think, in determining whether a guaranty is in fact an offer of guaranty or an absolute guaranty, is whether there is this mutual assent. In Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. Rep. 173, 29 L. ed. 480—and that is the leading case upon this subject—it was held that 'a guaranty signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, is, in legal effect, an offer or proposal on the part of the guarantor which requires an acceptance to complete the contract.' Mr. Justice Gray, who wrote the opinion, summarized the rule as follows: 'A contract of guaranty, like every other contract, can be made only by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.'" This statement from the opinion of Justice Gray is further approved in Marshall Field & Co. v. Haish, 85 Ill. App. 164; De Cremer v. Anderson, 113 Mich. 578, 71 N. W. 1090; Clinton Bank v. Goldstein, 86 Mo. App. 516.

"We think the true theory upon which guarantors are entitled to notice of acceptance," said Justice Carpenter, "is, that their undertaking is a mere offer, and does not become a binding contract until such notice: See Davis v. Wells, 104 U. S. 159, 26 L. ed. 686. It results from this theory that guarantors are entitled to notice of acceptance only when their undertaking can be construed to be an offer of guaranty. When, however, that undertaking recites a consideration, though, as in this case, that consideration is merely nominal, conclusive evidence is furnished that the guaranty has been made with the assent of the obligee, communicated to the guarantors; and in such cases notice of acceptance is unnecessary": Buhrer v. Baldwin (Mich.), 100 N. W. 468. Notice of acceptance is not required where the guaranty is executed contemporaneously with, and

as a part of the consideration of, the transaction guaranteed: v. Billman, 161 Ind. 610, 69 N. E. 449. See, too, Walker v. 25 Ala. 139, 60 Am. Dec. 498; Bank of Newbury v. Sinclair H. 100, 49 Am. Rep. 307; Furst etc. Mfg. Co. v. Black, 111 I 12 N. E. 504; Webster v. Smith, 4 Ind. App. 44, 30 N. E. 13 is formal notice of acceptance necessary where the guaranty i in response to a request for it by the creditor: Nelson Mfg. Shreve, 94 Mo. App. 518, 68 S. W. 376, citing Cooke v. Orne, 186; Dover Stamping Co. v. Noyes, 151 Mass. 342, 24 N. E. 5 too, Ferst v. Blackwell, 39 Fla. 621, 22 South. 892. Where strument of guaranty is executed and delivered, not as an guaranty, but as an acceptance of a proposition coming fr guarantee, no further notice is necessary: Lehigh Coal etc. Scallen, 61 Minn. 63, 63 N. W. 245.

3. **Sufficiency and Time of Notice.**—Notice of the accept a guaranty need not be in any particular form, nor need it con the guarantee himself. Knowledge, no matter how acquired, to be notice, and it may be inferred from facts and circum warranting such a conclusion: German Sav. Bank v. Drake Co., 112 Iowa, 184, 84 Am. St. Rep. 335, 83 N. W. 960, 51 L 758. See, too, Hickox v. Fels, 86 Ill. App. 216; Ford v. Har Ky. 169, 43 S. W. 199; Greer Mach. Co. v. Sears, 23 Ky. La 2025, 66 S. W. 521; Bascom v. Smith, 164 Mass. 61, 41 N. Lynn etc. Trust Co. v. Andrews, 180 Mass. 527, 62 N. E. 1061; man v. Peters, 18 Tex. Civ. App. 11, 44 S. W. 572. But notice acceptance of an offer of guaranty must be given within a rea time after such acceptance, if it is of such a kind that kno of it will not quickly come to the guarantors: Bishop v. Eat Mass. 496, 42 Am. St. Rep. 437, 37 N. E. 665; Peninsular St v. Adams Hardware Co., 93 Mo. App. 237.

4. **Excuse and Waiver of Notice.**—The insolvency of the p debtor at the time a guaranty is made to secure future a to him for a limited time, and the continuance of such inso are sufficient excuse for not giving notice to the guarantors advances made, or of the state of the account at the expira the guaranty: German Sav. Bank v. Drake Roofing Co., 112 184, 84 Am St. Rep. 335, 83 N. W. 960, 51 L. R. A. 758. A right to notice of acceptance may be waived by the form or tions of the guaranty, or a waiver may be implied from the of the instrument: Swisher v. Deering, 104 Ill. App. 572; Hu Roberts, 24 Ky. Law Rep. 2003, 72 S. W. 799; People's Bank marie, 106 La. 429, 31 South. 138.

d. Default of Principal Obligor.

1. **Necessity of Notice of Default.**—While there is some among the authorities, the generally accepted doctrine seems that in case of an absolute and unconditional guaranty the gu

becomes liable upon the default of the principal, without demand and notice of nonpayment. And this rule is generally recognized whether the instrument guaranteed is negotiable or not: Donley v. Camp, 22 Ala. 659, 58 Am. Dec. 274; Braddock v. Wertheimer, 68 Ark. 423, 59 S. W. 761; City Sav. Bank v. Hopson, 53 Conn. 453, 5 Atl. 601; Fegley v. Jennings, 44 Fla. 203, 103 Am. St. Rep. 142, 32 South 873; Rogers v. Burr, 97 Ga. 10, 25 S. E. 339; Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914; Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Lowe v. Beckwith, 14 B. Mon. 184, 58 Am. Dec. 659; Goff v. Janeway, 26 Ky. Law Rep. 525, 82 N. W. 267; Roberts v. Hawkins, 70 Mich. 566, 38 N. W. 575; Baker v. Kelly, 41 Miss. 696, 93 Am. Dec. 274; Bank of Newbury v. Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Wooley v. Sergeant 8 N. J. L. 262, 14 Am. Dec. 419; Pleasantville Mut. Loan etc. Soc. v. Moore, 70 N. J. L. 306, 57 Atl. 1034; Clay v. Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Castle v. Bickly, 44 Ohio St. 490, 58 Am. Rep. 839, 9 N. E. 136; Fales etc. Mach. Co. v. Browning, 68 S. C. 13, 46 S. E. 545; Providence Mach. Co. v. Browning, 68 S. C. 1, 46 S. E. 550.

Any conflict of judicial opinion on the question has arisen mainly "from a departure from the firmly settled rule of the common law in regard to contracts of guaranty, and an attempt to engraft upon such contracts—in a modified form, it is true—the law of demand and notice by which the liability of an indorser of negotiable paper is governed. The liability of a guarantor, like that of an indorser, is contingent, it is true, upon the default of the principal, but here the analogy ends. The liability of an indorser of a negotiable note does not become absolute unless there has been a demand upon the maker, and due notice of nonpayment by him has been given, not because the indorser has so stipulated in terms, but it is a condition annexed to the contract by the commercial law. In the case of an absolute guaranty, however, there is no condition annexed to the contract itself, nor is any condition implied by law, requiring the guarantee to notify the guarantor of the default of the principal. On the contrary, his liability is governed by the same rules of law by which the ordinary liability of one who has broken his contract is determined. And this being so, if one guarantees in absolute terms the performance of a specific act or contract by another, his liability being commensurate with that of the principal, whatever proof is necessary to support an action against the principal will be sufficient in an action against the guarantor. And as demand upon the principal is not necessary to support an action against him for a breach of his contract, it is not necessary to allege or prove notice of demand upon and default of the principal to charge the guarantor. Having guaranteed absolutely and unconditionally that another shall perform a certain specific contract, he must, at his peril, see that the contract is performed. The guarantee must know, it is true, of the

default of the principal, and this default may be unknowr
guarantor. But it is not a fact which lies within the excl
peculiar knowledge of the guarantor. On the contrary, it i
in regard to which the guarantor has the easy and accessibl
of information, either by inquiry of the guarantee, or of t
cipal himself. And having undertaken that the specific contr
be performed, and the guarantee having accepted and act
the faith of the undertaking, it is the duty of the guaranto
that the contract has been performed; and this being so, the
obligation, legal or moral, on the part of the guarantee to
the guarantor of a fact which the latter, having the means o
edge, is himself bound to know": Heyman v. Dooley, 77 Md.
Atl. 117, 20 L. R. A. 257. To the same effect, see Hubbard v
96 Wis. 578, 71 N. W. 1036.

A different doctrine appears to prevail in some jurisdict
least in the case of a guaranty of negotiable instruments: Se
v. Walsh, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440, 5
A. 782; Lemmert v. Guthrie (Neb.), 95 N. W. 1046.

Where a person gives a continuing guaranty, or a guarant
ing to future transactions, demand and notice seem neces
charge him. The reason is, that his agreement is collateral
ditional, and his liability does not accrue unless he who rece
benefit fixes it by demand and notice. The guarantor is liabl
condition that due diligence shall be used to promote payme
the original obligor. If, then, a contract of guaranty is co
and not absolute, it seems that that demand of payment an
of default, within a reasonable time, are necessary to comp
liability of the guarantor: Lane v. Levillian, 4 Ark. 76, 37 A
769; Mamerow v. National Lead Co., 206 Ill. 626, 99 Am. S
196, 69 N. E. 504; Stewart v. Knight (Ind. App.), 71 N.
Davis Sewing-Machine Co. v. Mills, 55 Iowa, 543, 8 N. W. 356
Mfg. Co. v. Littler, 56 Iowa, 601, 9 N. W. 905; Beebe v. Du
N. H. 249, 59 Am. Dec. 341; Bank of Alexander v. Turney
52 S. W. 762. As said in Milroy v. Quinn, 69 Ind. 406, 35 A
227: "But the rule seems to be settled, that when the gua
direct, and the thing guaranteed definite in its amount, and
to the guarantor at the time he gives his guaranty, neithe
of the acceptance of the guaranty, nor the default of his p
need to be given to the guarantor; for he knew when he m
guaranty the full extent of his liability. But when the g
is collateral, and the debt guaranteed yet to be created, the
of which is uncertain, and may be variable, and cannot be k
the guarantor at the time he makes the guaranty, notice w
reasonable time to the guarantor by the guarantee of his ac
of the guaranty and of the default of the principal is neces
the guarantor will be discharged; for he cannot, without suc
know that the guaranty is accepted, nor of the default of

cipal, nor the extent of his liability, and cannot protect himself from loss by the principal debtor."

2. **Sufficiency of Notice.**—If the case is one where notice of default is necessary, then only a reasonable one is required. The same strictness in making demand of payment and in giving notice to the guarantor is not required as in case of an indorser. Still the notice must be within a reasonable time: Cahuzac v. Samini, 29 Ala. 288; Dole v. Young, 41 Mass. (24 Pick.) 250; Dunbar v. Brown, 4 McLean, 166, Fed. Cas. No. 4129. And a creditor is not required to give notice of default to a guarantor where he has notice from an independent source, or where it is his duty, under the law, to take notice, or, in other words, where, in law, he is chargeable with notice: Mamerow v. National Lead Co., 206 Ill. 626, 99 Am. St. Rep. 196, 69 N. E. 504.

3. **Effect of Failure of Notice.**—The purpose of notice of default, in case of a collateral guaranty, is to enable the guarantor, if he elects to pay the guaranty and at once proceed against the principal debtor, to reimburse himself for the moneys thus paid. The right to notice is not absolute, in the sense that failure to give it will in all cases release the guarantor; but it is a relative right, and the failure to give it can be availed of only when the guarantor has been prejudiced by such failure. If the principal is insolvent at the time of his default, so that he cannot be held for the debt or any part of it, a failure to give notice to the guarantor can work him no injury and therefore will not release him: Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Taussig v. Reid, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918; Skofield v. Haley, 22 Me. 164, 38 Am. Dec. 307; Beebe v. Dudley, 26 N. H. 249, 59 Am. Dec. 341; Sullivan v. Field, 118 N. C. 358, 24 S. E. 735; Janes v. Scott, 59 Pa. St. 178, 98 Am. Dec. 328. There must not only be a want of notice within a reasonable time, but also some actual loss or damage thereby caused to the guarantor; and if such loss or damage does not go to the full amount of the claim, but only to a part thereof, he is not wholly discharged but only pro tanto: Ferst v. Blackwell, 39 Fla. 621, 22 South. 892; Swisher v. Deering, 204 Ill. 203, 68 N. E. 517; Mamerow v. National Lead Co., 206 Ill. 626, 99 Am. St. Rep. 196, 69 N. E. 504.

III. Interpretation and Construction of Contract.

a. **Strict Construction.**—A guarantor is said to be a favorite of the law, and entitled to stand upon the strict terms of his obligation. His contract is construed strictly, and his liability cannot be extended beyond the strict letter or precise terms of his engagement: Osborne v. McCarthy, 99 Ill. App. 351; Schoonover v. Osborne, 108 Iowa, 453, 79 N. W. 263; John S. Britain Dry Goods Co. v. Yearbout, 59 Kan. 684, 54 Pac. 1062; Crane Co. v. Specht, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015; Barnes v. Barrow, 61 N. Y. 39; Staver etc. Co. v. Locke, 22 Or. 519, 29 Am. St. Rep. 621, 30 Pac. 497, 17 L.

R. A. 652. This rule of strictissimi juris, however, applies
the extent that no implication shall be indulged to impose a
not clearly inferable from the language of the contract, and d
forbid that the contract shall be construed reasonably as oth
tracts are.

b. **Reasonable Construction.**—"When it is said that a gu
is entitled to stand upon the strict terms of his guaranty,
more is intended than that he is not to be held liable for a
that is not within the express terms of the instrument in wh
guaranty is contained; that his liability is not to be extended
plication beyond these limits, or to other subjects than th
pressed in the instrument of guaranty. But for the purpose
certaining the meaning of the language which he has used, a
determining the extent of his guaranty, the same rules of const
are to be applied as are applied in the construction o
written instruments. His liability is not to be extended
plication beyond the terms of his guaranty as thus ascer
The language used by him is, however, to receive a fair and
able interpretation for the purpose of effecting the objects fo
he made the instrument, and the purpose to which it was to
plied": London etc. Bank v. Parrott, 125 Cal. 472, 73 Am. S
64, 58 Pac. 164. To the same effect, see Sather Banking Co. v.
138 Cal. 724, 72 Pac. 352; New Haven County Bank v. Mitc
Conn. 206; Union Bank v. Coster, 3 N. Y. 203, 53 Am. De
Blades v. Dewey, 136 N. C. 176, 103 Am. St. Rep. 924, 48 S.
Blyth v. Pinkerton, 10 Wyo. 135, 67 Pac. 619; Mauran v. Bu
U. S. (16 Pet.) 528, 10 L. ed. 1056.

"A guaranty is a mercantile instrument to be construed ac
to what is fairly to be presumed to have been the understan
the parties, without any strict technical accuracy, but in furt
of its spirit and liberally to promote the use and convenience
mercial intercourse. It should be given that effect which w
accord with the intention of the parties as manifested by th
of the guaranty, taken in connection with the subject matter t
it relates, and neither enlarging the words beyond their natu
port in favor of the creditor, nor restricting them in favor of t
ty. The circumstances accompanying the whole transactio
be looked into in ascertaining the understanding of the pa
Hooper v. Hooper, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 5
the same effect see Tootle v. Elgutter, 14 Neb. 158, 45 Am. R
15 N. W. 228; Bank of Alexandria v. Turney (Tenn.), 52 S.
See, also, "Continuing Guaranties," post.

c. **Extrinsic Evidence.**—If there is a latent ambiguity in
tract of guaranty, arising from the fact that the language used
ceptible of two interpretations, extrinsic circumstances may be
to ascertain which construction the parties intended the inst

to have: Hotchkiss v. Barnes, 34 Conn. 27, 91 Am. Dec. 713. But if the terms of the guaranty are plain and unambiguous, parol evidence is not admissible to show that the parties intended something different from what is imported from its terms: Bank of Alexandria v. Turney (Tenn.), 52 S. W. 762; Marx v. Luling Co-op. Assn., 17 Tex. Civ. App. 408, 43 S. W. 596.

d. **Construction Against Guarantor.**—It has been thought that the rule that the language of a promise should be construed most strongly against the promisor cannot properly be applied to the construction of a guaranty: Morgan v. Boyer, 39 Ohio St. 324, 48 Am. Rep. 454. See, too, "Continuing Guaranties," post. But perhaps the better doctrine is, that if the guarantor, by the use of ambiguous language in his guaranty, renders it susceptible of two or more equally reasonable interpretations, that is to be adopted which makes most strongly against him. This is an acknowledged rule of construction in case of ordinary written contracts, and possibly there is nothing in the position of a guarantor, upon whose assurance reasonably interpreted another has acted, which should exempt him from it. He is not at liberty to say that the person to whom the guaranty is given was not justified in acting upon either interpretation, or that he should have acted upon one rather than upon the other: London etc. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; Taussig v. Reid, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918; Swisher v. Deering, 204 Ill. 203, 68 N. E. 517; Shine v. Central Sav. Bank, 70 Mo. 524; Hurley v. Fidelity etc. Co., 95 Mo. App. 88, 68 S. W. 958; Crist v. Burlingame, 62 Barb. 351. See, too, Sherman v. Mulloy, 174 Mass. 41, 75 Am. St. Rep. 286, 54 N. E. 345.

e. **Intention and Understanding of Parties.**—In construing contracts of guaranty, it is the duty of the court to ascertain and give effect to the intention of the parties; and in order to arrive at their intention, the circumstances under which, and the purposes for which, the contract was made may be proved and must be kept in view: Talmadge v. Williams, 27 La. Ann. 653; Crist v. Burlingame, 62 Barb. 351; Bailey v. Larchor, 5 R. I. 530. "Guaranties, like other contracts, must be construed so as to give effect to the intention of the parties; and if upon their face the intention is doubtful, resort may be had to parol evidence of the situation and surroundings of the parties": Gardner v. Watson, 76 Tex. 25, 13 S. W. 39. See, further, "Continuing and Limited Guaranties," post. Instruments of guaranty, it is said, should be construed as the parties to whom they are addressed might fairly and reasonably be expected to understand them: Gelpcke v. Quentell, 59 Barb. 250.

IV. Classes and Kinds of Guaranties.

a. **Special and General.**—A general guaranty is one for acceptance by the public generally. A special guaranty is limited to the person to whom it is addressed, and usually contemplates a trust or reposes

a confidence in some person. Such a guaranty may not be assigned until a right of action has arisen thereon: Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; Everson v. Gere, 122 N. Y. 290, 25 N. E. 492; Levy v. Cohen, 91 N. Y. Supp. 594, 45 Misc. Rep. 95; Tidioute Sav. Bank v. Libbey, 101 Wis. 193, 70 Am. St. Rep. 907, 77 N. W. 182. See, too, McLaren v. Watson, 26 Wend. 425, 37 Am. Dec. 260; Toppan v. Cleveland etc. R. R. Co., 1 Flip. 74, Fed. Cas. No. 14,099. "It is true," said Justice Earl, in Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379, "that a guaranty could be so drawn as to be personal and to have force and effect only as to the person to whom it is given, and so as not to be transferable or assignable to any other person. But in order thus to limit a guaranty, the language should be plain and peculiar, and the intention of the parties should not be left in uncertainty."

b. **Absolute and Conditional.**—An absolute guaranty is an unconditional undertaking on the part of the guarantor that the debtor will pay his debt; a conditional guaranty is an undertaking to pay if payment cannot by reasonable diligence be obtained from the principal debtor: Beardsley v. Hawes, 71 Conn. 39, 40 Atl. 1043. For illustrations of absolute guaranties, see Stewart v. Sharp County Bank, 71 Ark. 585, 76 S. W. 1064; Brown v. Wilcox, 73 Conn. 100, 46 Atl. 827; Garland v. Gaines, 73 Conn. 662, 84 Am. St. Rep. 182, 49 Atl. 19; Fegley v. Jennings, 44 Fla. 203, 103 Am. St. Rep. 142, 32 South. 873; McKibben v. Ripley (Neb.), 95 N. W. 1046; Cowan v. Roberts, 134 N. C. 415, 101 Am. St. Rep. 845, 46 S. E. 979, 65 L. R. A. 729. An absolute guaranty of payment differs from a conditional guaranty against loss as the result of nonpayment of a debt in this, that in the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, while in the second the contract is in the nature of a guaranty of collection, no liability being incurred until after, by the use of due diligence, the guarantee has become unable to collect the debt from the principal debtor: Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64; Burton v. Dewey, 4 Kan. App. 489, 46 Pac. 325. Guaranty of collection is the subject of a monographic note to Fall v. Youmans, 64 Am. St. Rep. 393-403.

c. **Continuing and Limited.**

1. **In General.**—There appears to be no general rule for determining whether a guaranty is limited or continuous in its operation unless it be this: The instrument should be given that effect which best accords with the intention of the parties as manifested by the terms of the guaranty when taken in connection with the subject matter and read in the light of the surrounding circumstances: First Nat. Bank v. Waddell (Ark.), 85 S. W. 417; Home Sav. Bank v. Hosie, 119 Mich. 116, 77 N. W. 625. If it appears that it was the intention of the parties to look to a course of dealing in the future,

with no limit of time fixed, or to a succession of credits to be given, the guaranty will ordinarily be construed to be a continuing one; and when the amount of the liability is limited and the time is not, the contract will, by implication, usually be construed as a continuing guaranty: Trustees of Presbyterian Bd. of Education v. Gilliford, 139 Ind. 524, 38 N. E. 404; Mathews v. Phelps, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108; Bank of Alexandria v. Turney (Tenn.), 52 S. W. 762.

Said the supreme court of Arkansas, quoting with approval from 14 American and English Encyclopedia of Law, 1140: "Where the guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will, in general, be construed to be a continuing guaranty and operative until revoked, and the guarantor will be held liable to the extent of his guaranty, notwithstanding the principal debtor may have, during the existence of the contract, contracted debts to an amount equal to or greater than the sum named in the guaranty, and paid them. The limit mentioned in the guaranty has reference to the amount of the guarantor's liability, and not to the amount of dealing between the purchaser and the one who gives credit": First Nat. Bank v. Waddell (Ark.), 85 S. W. 417.

Although a continuing guaranty is unlimited as to the time it shall continue, and the amount for which the guarantor shall be liable under it, yet such time and amount must be reasonable under all the circumstances of the case: Lehigh Coal etc. Co. v. Scallen, 61 Minn. 63, 63 N. W. 245; Harvey v. First Nat. Bank, 56 Neb. 320, 76 N. W. 870.

Many authorities take the view that, where the scope of a guaranty is doubtful, the presumption is against a construction that the guaranty is continuing: Sherman v. Mulloy, 175 Mass. 41, 75 Am. St. Rep. 286, 54 N. E. 345; Cheshire Beef Co. v. Thrall, 72 Vt. 9, 47 Atl. 160. See, too, John S. Britain Dry Goods Co. v. Yearbout, 59 Kan. 684, 54 Pac. 1062; Twohy v. McMurran, 57 Minn. 242, 59 N. W. 301. To quote from Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572: "The chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances, or be limited to the first. The better opinion seems to be that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country has, accordingly, been against construing guaranties as continuing, unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt."

Other authorities take the view that if a guarantor desires or intends to limit his responsibility to a single transaction, it is easy for him to say so in plain and unmistakable terms; and if he fails to do so, and by equivocal language induces the guarantee to extend credit, he is liable for the consequences. In other words, if he uses ambiguous language, it will be taken most strongly against him: Tootle v. Elgutter, 14 Neb. 158, 45 Am. Rep. 103, 15 N. W. 228; Rindge v. Judson, 24 N. Y. 64. See, too, "Interpretation and Construction of Contract," ante. It is said in Wright v. Griffith 121 Ind. 478, 482, that unless the words in which a guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it continues until the guaranty is revoked. This statement is approved in Trustees of Presbyterian Board of Publication etc. v. Gilliford, 139 Ind. 524, 38 N. E. 404.

"Probably the better rule of construction would be that applied to other contracts, to give the instrument that effect which shall best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor nor restricting them in aid of the surety": Mussey v. Rayner, 22 Pick. 223; Home Sav. Bank v. Hosie, 119 Mich. 116, 77 N. W. 625.

2. Illustrations.—In the following cases the language was held to amount to a continuing guaranty: "I do recommend my friend A. B. of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptance, in case he does not pay, I feel bound to pay. C. D.": Menard v. Scudder, 7 La. Ann. 385, 56 Am. Dec. 610. "I, B. M., being about to commence retailing dry goods, I hereby undertake and contract with L. & Co. to become responsible to them for the amount of any bills of merchandise sold by them to said M. agreeably to the terms of sale agreed upon by the parties, without requiring said L. & Co. to prosecute suit against said M. therefor": Lowe v. Beckwith, 14 B. Mon. 184, 58 Am. Dec. 659. "You can let Mr. J. L. Day have what goods he calls for, and I will see that the same are settled for": Hotchkiss v. Barnes, 34 Conn. 27, 91 Am. Dec. 713. "Please let Mr. P. Tully have the paints, oils, varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you": Boehne v. Murphy, 46 Mo. 57, 2 Am. Rep. 485. See, too, Scott v. Myatt, 24 Ala. 489, 60 Am. Dec. 485; Rapelye v. Bailey, 5 Conn. 149, 13 Am. Dec. 49. "Please let Mr. John Newman have credit for goods to the amount of $100, and for the payment of which I hold myself liable": Tootle v. Elgutter, 14 Neb. 158; 45 Am. Rep. 103, 15 N. W. 228. "I hereby guarantee the payment, when due, of all bills of goods sold, or that may be sold, on and after this date, by C. & Sons to B.": Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. 160. "In consideration that F. & Co. will and do sell to C., upon credit, sundry bills of goods from time to time as she may purchase or order,

I do hereby guarantee to said F. & Co. the prompt payment of all such bills at their maturity—said maturity to be sixty days from date of bills; hereby waiving any and all notice of times or amounts of sales, or defaults or delays in payment therefor. Not exceeding $400": D. B. Fiske & Co. v. Rickel, 108 Iowa, 370, 79 N. W. 120. See, too, Crittenden v. Fiske, 46 Mich. 70, 41 Am. Rep. 146, 8 N. W. 714. "We herewith guaranty the account of D. to the amount of $500. We are willing to make monthly settlement for electrical supplies purchased by him; such payments to be made every 15th of the month for the month previous": Columbia Elec. Supply Co. v. Kemmet, 67 N. J. L. 18, 50 Atl. 663. "I guarantee the payment of your account with R. to the amount of $400. I ask you to state terms of sale on each invoice. Please forward [goods] now": Friedman v. Peters, 18 Tex. Civ. App. 11, 44 S. W. 572.

For further illustrations of continuing guaranties, see West-Winfree Tobacco Co. v. Waller, 66 Ark. 445, 51 S. W. 320; Doyle v. Nichols, 15 Colo. App. 458, 63 Pac. 123; Indiana Bicycle Co. v. Tuttle, 74 Conn. 489, 51 Atl. 538; Dover Stamping Co. v. Noyes, 151 Mass. 342, 24 N. E. 53; Celluloid Co. v. Haines, 176 Mass. 415, 57 N. E. 691; Young v. Brown, 53 Wis. 333, 10 N. W. 394. An instrument guaranteeing the payment of money collected by an employé until notice from the obligor is held to be an absolute continuous guaranty in Tapper v. New Home Sewing-Machine Co., 22 Ind. App. 313, 53 N. E. 202. See, too, John L. Tolman Co. v. Butt, 116 Wis. 597, 93 N. W. 548.

The following instruments have been held not to create continuing guaranties: "Please deliver to H. goods as he may want from time to time, not exceeding in amount $300, and if not paid for by him within thirty days, I will be responsible for the same": Cutler v. Ballou, 136 Mass. 337, 49 Am. Rep. 35. "The bearer, Mr. H. H. Bowlus, is visiting your city, buying a few goods in your line, and anything you may be able to sell him will be paid promptly as agreed upon, which I herewith guarantee": Morgan v. Boyer, 39 Ohio St. 324, 48 Am. Rep. 454. "I hereby guarante to you the payment of such amount of goods, at a credit of one year, not exceeding five hundred dollars, as you may credit to John H. Prentiss": Fellows v. Prentiss, 3 Denio, 12, 45 Am. Rep. 484. "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you will have your pay in a reasonable length of time": Gard v. Stevens, 12 Mich. 292, 86 Am. Dec. 52. "I will be responsible for the hotel bill of H., and will see it paid within twenty days": Patterson v. Gage, 11 Colo. 50, 16 Pac. 560. For further illustrations of guaranties held not to be continuing, see Rouss v. Creglow, 103 Iowa, 60, 72 N. W. 429; Sherman v. Mulloy, 174 Mass. 41, 75 Am. St. Rep. 286, 54 N. E. 345; Collender v. Flint, 187 Mass. 104, 72 N. E. 345; Columbus Sewer Pipe Co. v. Gauser, 58 Mich. 385, 55 Am. Rep. 697, 25 N. W. 377, and note; Fogel v. Blitz, 128 Mich. 503, 87 N. W. 640;

Merchants' etc. Bank v. Calmes, 82 Miss. 603, 35 South. 161. A guaranty of the payment of interest on a promissory note is not a continuing guaranty, and applies only to the interest accruing before the maturity of the note: Rector v. McCarthy, 61 Ark. 420, 54 Am. St. Rep. 271, 33 S. W. 633, 31 L. R. A. 121.

CLEMENS v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

[184 Mo. 46, 82 S. W. 1.]

PUBLIC STREETS—Change of Grade, Injunction Against.—Where a change in the grade of a city street is being made in pursuance of valid legislative and municipal authority, a citizen, whether or not his land abuts on the street, whose property is not taken but merely subjected to consequential damages, cannot have the work enjoined until his damages are ascertained and paid, under a constitutional provision that "private property shall not be taken or damaged for public use without just compensation." His remedy, if any, is an action for damages after the completion of the improvements. (p. 536.)

McKeighan & Watts and Barclay & Fauntleroy, for the appellants.

Rassieur & Buder, for the respondent.

48 GANTT, P. J. This is an appeal from a decree of the circuit court of the city of St. Louis perpetually enjoining the defendants from changing the grade of Arkansas avenue in said city, between the north line of Cherokee street and the south line of McKean avenue, and from changing the grade of the alley running from the Gravois Road or Gratiot avenue to Arkansas avenue through city block 1492 of the city of St. Louis.

49 This suit was commenced June 20, 1899, and a preliminary injunction was granted June 26, 1899.

The petition states that the plaintiff is the owner of lots 8, 9 and 10 in block 1492, having an aggregate front of one hundred and sixteen feet and one inch on the north line of Cherokee street, by a depth northwardly of one hundred and twenty-seven feet, eight and three-fourths inches in a line parallel with the east line of Arkansas avenue to an alley fifteen feet wide, and that the Connecticut Mutual Life Insurance Company is the owner of lot No. 7 in said block, a strip of ground

seventy feet wide on the north line of Cherokee street and running northwardly of that width one hundred and twenty-seven feet, eight and three-fourths inches to the said alley; and the said defendant also is the owner of the remainder of said block 1492, which said block bounds on the east line of Arkansas avenue between Cherokee street and McKean avenue, and also owns block 1494 which bounds on the west line of Arkansas avenue between said two streets that the city of St. Louis established a grade for the said Cherokee street and Arkansas avenue at their intersection and at the places where they adjoin the said city blocks, and with the knowledge of said grade, the plaintiff purchased and improved his said property, adjusting his buildings to said grade; that the defendant and its agents without legal authority and against the protest of plaintiff are now engaged in making and constructing the said Arkansas avenue between the said Cherokee street and McKean avenue, and in so doing are changing the grade of said Arkansas avenue from Cherokee street to McKean avenue, and of the said Cherokee street at the point of its intersection with Arkansas avenue by raising the same two and six-tenths feet "and by raising the same at said alley at the point of its intersection with said Arkansas avenue four and two-tenths feet, thereby interfering with the free ingress so and egress to and from plaintiff's said property over and along said alley from and into said Arkansas avenue; that by so making said grade as they are about to do the property of plaintiff will be placed in a depression below the grade of neighboring streets and subject to overflows, to the irreparable damage of plaintiff." The answer is as follows:

"1. The defendants, by their counsel, for answer to the plaintiff's petition herein admit the defendants are corporations as alleged.

"Whether or not plaintiff is the owner of the tracts of land, or any of them, mentioned in said petition, said defendants have no knowledge or information sufficient to form a belief, and therefore require proof.

"Whether plaintiff purchased, improved or maintained his said property with knowledge of the grade of the adjacent streets, these defendants have no knowledge or information sufficient to form a belief, and therefore require strict proof.

"Defendants admit that the city of St. Louis by ordinance established a grade for the said Cherokee street and Arkansas avenue.

"Defendants deny that they are changing the grade of Arkansas avenue from Cherokee street to McKean avenue, or of Cherokee street at its intersection with said Arkansas avenue.

"Defendants deny that they are raising the grade at either of said streets, or portions of said streets, two and six-tenths feet.

"Defendants deny that they are changing the grade of any of said streets, or portions of said streets.

"Defendants further deny they are now engaged in making or constructing any portion of said streets without legal authority.

"2. Defendants for further answer admit that they have been making certain improvements in and upon the streets aforesaid, but defendants aver that the same are strictly in accordance with the grade as fixed by [51] the city of St. Louis at the places where said improvements are being made by defendants.

"Defendants further deny generally all the allegations of the petition not otherwise referred to in this answer.

"Having fully answered, defendants ask to be hence discharged with their costs."

No reply was filed.

At the April term, 1900, a final decree of injunction perpetually enjoining defendants was entered.

The facts developed on the trial are the following: Plaintiff is the owner of lots 8, 9 and 10 in block 1492 and defendant owns lot No. 7 and the remainder of said block. City block 1492 is bounded on the south by Cherokee street, on the east by Gravois road or avenue, on the north by McKean avenue, and on the west by Arkansas avenue. At the time plaintiff purchased his said lots there was in force an ordinance, No. 12,525, approved November 7, 1883, establishing the grade of Arkansas avenue at the intersection thereof with Cherokee street and with McKean avenue.

On November 26, 1897, another ordinance No. 19,206 was enacted, establishing the grades of streets and avenues in the district bounded south of Cherokee street and by Utah street, running west of Grand avenue; north by Arsenal street, east by Louisiana avenue and Gravois avenue, and west by Spring avenue and repealing parts of ordinance 12,525, 15,432, 16,178, 17,274 and 17,732. The defendant, through its agent, the Pitzman Surveying Company, was proceeding to curb and gutter its property and construct the superstructure of Arkansas

avenue adjacent to its property in said street under a permit from the city authorities, when this injunction was granted perpetually enjoining it from doing said work in conformity to ordinance 19,206. The city of St. Louis was not made and is not a party to said suit.

The liability of the city for damages resulting to [52] adjoining property owners who have built their improvements in conformity to the first grade established by the city by a change of such grade is only incidentally and collaterally involved in this case, and the city has not been made a party defendant, and no damages are asked against the city. It appeared that plaintiff purchased his lots 8, 9 and 10 in block 1492 in 1890 and 1893, and had constructed thereon a brick stable and feed store and sheds and carriage-houses thereon and a residence, and laid granitoid pavements abutting on Cherokee street in front of lots 8, 9 and 10, fronting on said street. Plaintiff's said property nowhere touches Arkansas avenue. By the changes of grade from that established by ordinance 12,525 in 1883 to that fixed by ordinance 19,206 in 1897, Arkansas avenue at the intersection of Cherokee street will be raised two and six-tenths feet, and at the mouth of the alley between Arkansas avenue and Gravois avenue in block 1492 on Arkansas avenue, the grade will be raised four and two-tenths feet, and at the point on Arkansas avenue where the same intersects with McKean avenue, the grade will be raised five and eight-tenths feet, and plaintiff's evidence tended to prove that when said grade was thus changed the southwestern corner of plaintiff's lot 8 would be one foot and four inches below said new grade. It will thus be seen that plaintiff's property does not abut on Arkansas avenue, the street affected directly by the change of grade, but plaintiff's right to recover in this suit is based on the claim that, notwithstanding his property does not abut on Arkansas avenue, his property and certain rights and easements connected therewith will be affected to his injury by the said contemplated changes of grade by the ordinance 19,206 of November 26, 1897, and his ingress and egress to and from his said property over and along the alley in block 1492 to Arkansas avenue would be interfered with. It was admitted the city had taken no steps to have such supposed damage to plaintiff's property assessed. According [53] to the evidence of Mr. Varrelman, the street commissioner of the city, and witnesses for plaintiff, the grade of the alley itself had never been established; that no profile of it had ever been made. The plain-

tiff's evidence showed that the mouth of the alley necessarily conformed to the street into which it opened, but no work had ever been done in the alley itself and no stakes driven in it, and save as to the point of intersection of the alley with Arkansas avenue there was not even a paper grade defined by the city authorities.

While there is a large volume of evidence, there is practically little conflict.

1. By section 26 of article 3 of the scheme and charter of St. Louis, paragraph 2, the municipal assembly of the city of St. Louis has the power to grade and change the grade of streets, avenues and alleys in said city when deemed best for the public good, subject to the liability of the city for damages resulting to abutting property owners from the exercise of such power. Prior to the amendment of the constitution in 1875, the city in the legitimate exercise of its corporate powers could change the grade of a street or alley by ordinance without being liable for any consequential damages to an abutting owner: City of St. Louis v. Gurno, 12 Mo. 414; Taylor v. St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Hoffman v. St. Louis, 15 Mo. 657; Soulard v. St. Louis, 36 Mo. 546.

With the exception of Thurston v. City of St. Joseph, 51 Mo. 510, 11 Am. Rep. 463, the decision in St. Louis v. Gurno, 12 Mo. 414, was uniformly followed by this court until the adoption of our constitution of 1875. By section 21 of article 2 of that constitution it is provided that "private property shall not be taken or damaged for public use without just compensation." After these words, "or damaged," were added to this section it was ruled in Householder v. Kansas City, 83 Mo. 488, that a city cannot change the grade of a street to the damage of a lot abutting [54] upon it without compensation to the owner: Sheehy v. Kansas City etc. Ry. Co., 94 Mo. 574, 4 Am. St. Rep. 396, 7 S. W. 579.

In Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695, a fire-engine house was commenced by the city upon the lot adjoining the plaintiff's lot and he sought an injunction to prevent it. Judge Black, after adverting to the settled rule prior to the change in the constitution above mentioned, reviewed the authorities on this subject and the whole court concurred in holding that the amendment did not cover the case and dismissed the bill. Among other cases he cited the decision in Rude v. St. Louis, 93 Mo. 408, 6 S. W. 257, in which case the plaintiff owned property on High street

five hundred feet distant from a point where railroad tracks crossed that street. The tracks were depressed by authority of authorized ordinances from four to six feet to conform to a system of bridges then in process of erection. The street was allowed to remain in this condition impassable for teams for three years. Suit for damages because of the obstruction of the street and it was held he could not recover. The like result was reached in Fairchild v. St. Louis, 97 Mo. 85, 11 S. W. 60 and Canman v. St. Louis, 97 Mo. 92, 11 S. W. 60. These cases were like Rude's case except that in one plaintiff's property was three hundred and fifty feet and in the other one hundred and twenty-five feet from the same obstruction.

In those cases it was held that to bring a case within the amendment, the plaintiff, if suing for consequential damages, must show that he suffered an injury special and peculiar to his property, and that it was not enough to show a damage the same in kind as that suffered by other persons though different in degree, but he must show that the property itself or some right or easement connected therewith is directly affected and that it is specially affected.

Judge Adams, who by common understanding was the author of the amendment "or damage" to section 21 of article 2 of the constitution, and who wrote the [55] opinion in Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463, in the last-mentioned case said: "I maintain that the legislature may grant power to cities to improve the streets, or to appropriate them, to the injury of the lot-holder. But when such power is exercised to the injury of the lot-holder, he must have an adequate remedy. The city may exercise the power, but must answer for the consequences to the lot-holder. The true ground of his right to recover is his appurtenant easement or property interest in the street itself."

In Knapp, Stout & Co. v. St. Louis, 153 Mo. 572, 55 S. W. 104, it was held that to entitle a property owner to relief against the attempt of the city of St. Louis to vacate a street, he must allege and prove that he owns property abutting on that part of the street which the ordinance vacates, and that he will suffer a special injury and not merely such inconvenience as is cast upon all other persons in that neighborhood, and unless the petition for injunctive relief avers that the plaintiff's lot abuts on the street to be vacated, it is fatally defective. In various cases it has been ruled that an abutting owner has a clear legal right to damages for vacating a street

on which his property abuts: Heinrich v. St. Louis, 125 Mo. 424, 46 Am. St. Rep. 490, 28 S. W. 626; Christian v. St. Louis, 127 Mo. 109, 29 S. W. 996. But the very fact that he had ample remedy at law was held to deprive him of the remedy by injunction: Knapp, Stout & Co. v. St. Louis, 153 Mo. 574, 55 S. W. 104.

The foregoing cases sufficiently indicate the state of the decided law on this subject in this commonwealth.

Applying these principles of law and equity to the facts developed, ought the decree of the circuit court be affirmed? Arkansas avenue, the grade of which was raised by the ordinance of 1897, is distant seventy feet from plaintiff's premises. In other words, plaintiff is not an abutting owner on said Arkansas avenue. The defendant, the Connecticut Mutual Life Insurance Company, did own property abutting on Arkansas avenue in blocks 1492 and 1494, and was proceeding to improve [56] its said property by constructing guttering and curbing and the superstructure of the street in front of said property presumably for the purpose of putting it on the market, as it was wholly unimproved. It was having these street improvements made in strict conformity to the grade established by ordinance in 1897 for Arkansas avenue.

There can be no doubt the city had authority to establish the grade in the first instance, and to change it in 1897, if in the opinion of the municipal assembly it was deemed best for the public interest. No change of the grade on Cherokee street adjoining plaintiff's property had been made when this injunction was sued out, and it is only by assuming that the city hereafter will adopt a level or straight grade from the points established on Arkansas avenue and Gravois avenue that there will be any change of grade in front of plaintiff's property on Cherokee street.

There was much evidence from plaintiff's own witnesses that the city often accommodates the grade to the buildings built in conformity to the old grade when a new one is adopted. No actual grade lines have been drawn between Arkansas avenue and Gravois avenue, or along the projected alley in block 1492. The ordinance of 1897 does not define these lines. It merely fixes the points of elevation at the intersections of Arkansas avenue and the mouth of the alley.

The act of June 2, 1899, which went into effect in August, 1899, has no application to this case, which was commenced before that act took effect and is bottomed on facts existing prior to the enactment of that law.

This case presents an important question. Does section 21, article 2, of the constitution, in the absence of any legislation, permit any public improvement on a street which does not take the property of a citizen, or invade or trespass upon it, to be stopped until every damage to owners, near and remote, on the street is [57] paid? We have seen that prior to the constitution of 1875 a change of grade under a valid charter power did not give any cause of action, but by the amendment of section 21, article 2, of the constitution damages resulting to an abutting owner by the change of the grade of a street are actionable. Unquestionably, when there is a taking of the property, the owner has a right to his compensation before his possession is disturbed, but where, instead of taking his property, it is merely damaged by the lawful public improvement, can he stop the work until his damage is ascertained and paid? We find no case in which this view of this constitutional question has been presented to and decided by this court. It is true there are some general observations, but the facts did not call for any opinion. This exact point has been covered by the supreme court of Louisiana. The constitution of that state of 1879 has the same provision which is found in section 21, article 2, of our constitution of 1875. It is known as article 156 of the constitution of Louisiana. In McMahon v. Railroad, 41 La. Ann. 827, an injunction was sought in aid of a suit for damages to abutting property by the construction of a railroad on a street in pursuance of authority from the city of Shreveport. The defendant was permitted to give bond and proceed with the work. The court, through Judge Fenner, said:

"It is true the constitution, article 156, provides that 'Private property shall not be taken or damaged for public purposes without adequate compensation being first paid.' We will not say what might be the effect of this article on the right to bond if the act prohibited involved the taking of property, the value of which might be settled in advance. But in this case there is no taking of plaintiff's property, which is not involved or touched. The damages claimed are purely consequential in their nature, necessarily conjectural, and impossible of any accurate determination except after the [58] construction of the road. To impose upon parties the necessity of settling and paying such damages before proceeding with the work would be to require a manifest impossibility; and if such an injunction could not be bonded it would operate

a perpetual bar to the construction of public works which was certainly not contemplated by the constitution. . . . . The defendant has done nothing but what it had a legal right to do, and it has exercised that right in a proper, prudent and cautious manner, inflicting upon plaintiffs no injury or damage except such as necessarily results from the exercise of that right. . . . . But, in this case, the legal right passed to the defendant encumbered with the restriction imposed by article 156 of the constitution, above quoted, and it must discharge that burden. . . . . The article 156 of the present constitution, in providing that 'private property shall not be taken nor damaged for public purposes without adequate compensation,' etc., only extended its protecting shield over one additional injury and required compensation, not only for property taken, but also for property damaged.

"As in the case of a taking the measure of compensation is the value of the property taken, so in the case of damage, the measure of compensation is the diminution in the value of the property."

In Denver etc. R. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777, injunction was sought by an abutting owner to restrain further operation of the railroad on the street. The supreme court for the purposes of the case assumed that the laying of a third rail and doing the business of a standard gauge railroad on the street was a new and additional servitude, and that those acts might result in damage to the abutting owner for which under the constitution he was entitled to compensation, and then asks the question: "Should a court of equity, at his suit, in view of the facts of the case, grant an injunction forbidding the acts in question?" The court answers in the negative, [59] and says: "Where the fee of an individual is not sought to be taken, though an abutting lot owner, he cannot enjoin the construction and operation of a railroad merely because the damages to his premises are not compensated in advance; provided the company act under sufficient legislative and municipal authority: 1 High on Injunctions, 2d ed., sec. 637. It is contended that this doctrine ought not to be held applicable here, because of the peculiar phraseology of our constitution. True, this instrument declares that private property shall not be 'damaged' without compensation. It does not, however, require that the damages, where property is not 'taken,' shall be computed and paid before the injuries complained of are inflicted. It provides that 'property shall not

be needlessly disturbed, or the proprietary rights of the owner therein devested,' till remuneration be made. The proprietary rights of plaintiffs in the land are not devested, because such rights do not exist. There may be a disturbance of the easements connected with the use or enjoyment of their abutting lots; but needful disturbances of property may take place without prior compensation. The city council, by adopting the right of way ordinance, determined conclusively, so far as the general public is concerned, including all interest of the plaintiffs common to the general public, that the anticipated disturbances were needful. But the disturbances mentioned in the constitution are, in our judgment, disturbances of property sought to be taken, or, at least, property of the same owner out of which that desired is to be carved. We do not think the clause in question was intended to require the prior assessment and payment of probable damages for disturbances, to take place in the future, of an easement connected with the property of a party, no part of which is taken, near or adjacent to the land condemned."

The court then refers to the decisions of the supreme court of Illinois construing a provision of the constitution of Illinois similar to that of Colorado, in which injunctive relief was denied: Stetson v. Chicago etc. R. R. Co., 75 Ill. 74; Patterson v. Chicago etc. R. R. Co., 75 Ill. 588; Peoria etc. R. R. Co. v. Schertz, 84 Ill. 135.

In the Schertz case, the court says: "In this case, as in that, it was contended, under that clause of section 13, article 2, of the constitution which provides 'private property shall not be taken or damaged for public use, without just compensation,' all abutting land owners are entitled to have such consequential damages as they may sustain, assessed and paid, before a railroad company can acquire any right to put down and operate a track in a public street, and that putting it down without such assessment and payment is a violation of law. But in our former decision it was distinctly ruled that such company was not bound to make compensation for consequential or expected damages that might result to others, previous to entering upon its own land, or lands of others not complaining, to do work it has a lawful right to do under powers conferred by its charter."

These principles were fully sustained and reiterated in the later case of Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473.

In the most elaborate and thoroughly considered decision the supreme court of West Virginia gave the same construction to this constitutional provision, in Spencer v. Point Pleasant etc. R. R. Co., 23 W. Va. 406. See, also, Lorie v. North Chicago etc. Ry. Co., 32 Fed. 270. In nearly all of these cases it is held that the remedy is by action at law.

In our opinion, the Colorado, Illinois and West Virginia and Louisiana courts correctly construe section 21 of article 3 of our constitution, which is found in the constitutions of those states in practically the same words as in ours, and in holding that where the property of the citizen is not taken and his proprietary rights [61] not disturbed, but the damage to his property is purely consequential, he is not entitled to have the same ascertained and paid before the proposed public work is done, and is not entitled to have the work done in pursuance of valid legislative and municipal authority enjoined until his damages are ascertained and paid, but that his remedy is one at law for damages.

Having reached this conclusion, we hold that whether plaintiff was an abutting owner or not he was not entitled to have the improvements which were being made pursuant to an ordinance of the city and clearly within its charter powers enjoined; that plaintiff has not brought himself within any recognized head of equity jurisdiction and if he has any cause of action it is against the city for damages. It becomes unnecessary for us to determine other propositions urged by counsel.

The judgment of the circuit court is reversed, with directions to dissolve the injunction and dismiss the bill.

All concur.

An Injunction will not lie, according to Pennsylvania etc. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273, at the suit of an abutting property owner, when the entry upon a street by a railroad is under the authority of the municipal agency invested with the control of the street. In such a case, he has an adequate remedy at law in an action for damages. See, too, Fulton v. Short Route Co., 85 Ky. 640, 7 Am. St. Rep. 619. But in Donovan v. Allert, 11 N. Dak. 289, 95 Am. St. Rep. 720, it is held that an abutting owner is entitled to an injunction to restrain the erection of telephone poles in the street until compensation is made him. See, too, Thornton v. Sheffield etc. R. R. Co., 84 Ala. 109, 5 Am. St. Rep. 337; Vanderlip v. Grand Rapids, 73 Mich. 522, 16 Am. St. Rep. 597.

MILLER v. DUNN.

[184 Mo. 318, 83 S. W. 436.]

DEEDS—Life Estate or Fee Simple.—If the granting clause of a deed contains no words of limitation in respect to the nature and character of the estate conveyed, and standing alone creates a fee simple in the grantee, but the habendum clause reads, "To have and to hold unto the said grantee and the heirs of her body forever," the instrument conveys a life estate only, with a remainder in fee to the heirs of the body of the grantee. (p. 540.)

C. C. Bigger, for the appellants.

West & Bresnehan, for the respondents.

320 FOX, J. This is a suit in ejectment, brought by the plaintiffs, who are the children of Mary Louisa Barger, deceased, against the defendant, William Dunn, to recover the south half of the northwest quarter of section 7, township 57, range 21, in Linn county, Missouri. The plaintiff William V. Miller is a son of Mary Louisa Barger by her former husband, Miller; the plaintiffs Jacob Barger, Elena Barger, John Barger and Louis Barger are minors, and by their curator, John R. Belshe, join with the other plaintiffs in prosecuting this suit. The petition, which is in the usual form, was filed on the sixteenth day of April, 1902, returnable to the May term, 1902, of the circuit court of Linn county. The suit was originally brought against the defendant William Dunn alone, he being in possession of the land as the tenant of his codefendants. The petition alleged January 2, 1902, as the date of ouster, claims damages in the sum of one hundred dollars, and alleges the monthly value of the rents and profits of the premises to be fifteen dollars. At the return term of the court James S. McNichols and Agnes C. McNichols, on their own motion, were made parties defendant, and filed their separate answer, which is a general denial except that they admitted the possession of the premises by their codefendant Dunn, as alleged in the petition; the defendant Dunn also filed a separate answer, which is a general denial except that he admitted that he had been and was in the possession of the premises, as alleged in the petition, claiming that he had been and was holding the same as tenant of his codefendants. On May 27, 1902, a trial of said cause was had before the court, a jury being waived. The facts, as developed by the evidence and admitted, are substantially 321 as follows: William Belshe,

the grandfather of the plaintiffs, was the original patentee, from the United States government, of the land in question, and was the common source of title. On April 1, 1871, said William Belshe and his wife Hannah executed and delivered to their daughter, Mary Louisa Barger, their deed, of that date, conveying the land in question. And it was agreed at the trial that whatever right or title plaintiffs have to the premises in question is derived through said deed from their grandparents, Belshe and wife, to their mother, Mary Louisa Barger. At the time said deed was made and delivered, Mrs. Barger had one child by a former husband, the plaintiff William V. Miller. It was also agreed at the trial that the rental value of the premises per year was one hundred and fifty dollars, or twelve dollars and fifty cents per month. It was further agreed that Mary Louisa Barger was dead, and that the plaintiffs were her children and her sole and only heirs. In the court below the plaintiffs claimed the premises in question under the deed from their grandparents, William Belshe and wife, to their mother, Mary Louisa Barger, now deceased, and not by inheritance, as heirs of their said mother.

The deed involved in this controversy was as follows:

"Know all men by these presents, that I, William Belshe, and Hannah Belshe, his wife, of the county of Linn, in the state of Missouri, have this day, for and in the consideration of the sum of eleven hundred dollars, to the said William Belshe, in hand paid by Mary Louisa Barger, of the county of Livingston in the state of Missouri, granted, bargained and sold, and by these presents do grant, bargain and sell unto the said Mary Louisa Barger, the following described tract or parcel of land, situated in the county of Linn in the State of Missouri: That is to say: the south half of the northwest quarter of section seven in township fifty-seven of range twenty-one, containing seventy-four acres and fifty-hundredths of an acre, more or less.

322 "To have and to hold the premises hereby conveyed, with all the rights, privileges and appurtenances thereto belonging or in anywise appertaining unto the said Mary Louisa Barger and the heirs of her body forever, I, the said William Belshe, hereby covenanting to and with the said Mary Louisa Barger, her bodily heirs, for himself, his heirs, executors and administrators, to warrant and defend the title to the premises hereby conveyed against the claim of every person whatsoever.

"In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of April, 1871.

his
"WILLIAM X BELSHE. [Seal]
mark

her
"HANNAH X BELSHE. [Seal]
mark."

At the close of the evidence offered by plaintiffs, defendant interposed a demurrer to the evidence, which was by the court sustained and judgment was rendered for defendants. From this judgment plaintiffs in due time and form prosecuted their appeal and the cause is now before us for consideration.

This appeal presents but one legal proposition for our consideration—that is, the proper construction of the deed offered in evidence by plaintiffs.

The dispute is sharply presented. The appellants contend that the deed simply conveyed a life estate to Mary Louisa Barger, with remainder to these plaintiffs, who were the heirs of her body, and on the other hand it is contended by respondents that the instrument conveyed an absolute estate in fee. With commendable frankness of counsel presenting this cause, it is conceded that if only a life estate is conveyed by the deed 323 involved in this controversy, plaintiffs are entitled to recover, and if otherwise, an estate in fee was conveyed, the judgment was for the right parties and should be affirmed.

It will be observed upon examination of the instrument that we are called upon to construe in this cause, that the granting clause contained no words of limitation in respect to the nature and character of the estate conveyed and standing alone would clearly create a fee simple in the grantee. However, it is equally clear that the habendum clause, "To have and to hold the premises hereby conveyed, with all the rights, privileges and appurtenances thereto belonging or in any wise appertaining unto the said Mary Louisa Barger and the heirs of her body forever," does limit the estate conveyed, and this limitation is emphasized in the warranty clause wherein it recites that, "I, the said William Belshe, hereby covenanting to and with the said Mary Louisa Barger, her bodily heirs, to warrant and defend," etc.

The proposition confronting us upon the record in this cause is by no means a new one. It has frequently been in judgment before this court.

Applying the law as announced by the long and unbroken line of decisions by this court upon instruments involving the same question as is here presented, there can be no escape from the conclusion that the deed before us conveyed simply a life estate, with remainder to the heirs of the body of the grantee, and that the plaintiffs are entitled to recover. Marshall, J., in Utter v. Sidman, 170 Mo. 284, 70 S. W. 702, covers the entire field of discussion upon this proposition. The deed in that case calling for the construction of its terms by this court contained substantially the same provisions as the one in the case at bar.

After a clear and exhaustive review of all the authorities, giving all four corners of the instrument due consideration, it was ruled in that case that the deed [324] simply conveyed a life estate, with a remainder in fee to the heirs of the body of the grantee.

In view of so recent an announcement of the law clearly and fully covering the subject involved in this dispute, we feel that it would add nothing to the legal literature to repeat what has been so correctly and well said by the learned judge in the Utter-Sidman case.

The judgment in this cause is reversed and remanded with directions to the circuit court to enter judgment for the plaintiffs for the recovery of the possession of the real estate in suit, also for such sum of money as is conceded by the record in this cause to be the reasonable value of the rents and profits of the land in dispute.

Gantt, P. J., concurs.

Burgess, J., absent.

For an Instance of an Habendum clause in a deed controlling the granting clause so as to limit the estate of the grantee to a life estate with remainder to her children, see Bodine v. Arthur, 91 Ky. 53, 34 Am. St. Rp. 162. Estates tail are discussed generally in the note to Outland v. Bowen, 7 Am. St. Rep. 428-432.

MUELLER v. BUENGER.

[184 Mo. 458, 83 S. W. 458.]

WILLS—After-acquired Realty.—The Intention of the testator is the controlling guide in determining the disposition of after-acquired real estate; and that intention must be gathered from the four corners of the will, in the light of the circumstances under which it was written. (p. 556.)

WILLS—After-acquired Realty—Single Devisee.—If a devise is of the whole estate of the testator to the same beneficiary, it will pass after-acquired property as well as that owned at the time of the making of the will. (p. 556.)

WILLS—After-acquired Realty—Residuary Devisee.—If a devise is of a particularly described interest in certain land to a particular devisee, and there is a devise of the residuum of the estate to other particularly named devisees, or to the heirs of the testator generally, any after-acquired interest in the property mentioned in the particular devise will pass to the persons named in the residuary clause, and not to the particular devisee named in the particular devise of the particular interest. (p. 556.)

WILLS—After-acquired Realty—Residuary Devisee.—If a testator gives to his niece "my interest in the tract of land owned" by himself and another, and, after specifically providing for other relatives, gives to his wife "all the remainder of my property, both real and personal, I may possess at my death, excepting that which I have mentioned in the first part of this will," and, after making the will, acquires the interest of his co-owner in the tract referred to in the devise to his niece, this after-acquired property passes to his wife and not to his niece. (p. 557.)

George W. Lubke, for the appellant.

George W. Wolff, for the respondent.

460 MARSHALL, J. This is an action under section 650 of the Revised Statutes of 1899, to determine the interests of the parties, under the will of William Buenger, to fifty-three arpens of land in St. Louis county.

The plaintiff claims title to the whole of the land, except an undivided one twenty-fourth thereof which is vested in the heirs of Ann T. Hume, and the defendant claims that the plaintiff is only entitled to an undivided one-half of the land, and that she is entitled to a life estate in the other half thereof, with remainder to Annie Holtman, her child by her first marriage, and in the event of her death without issue, then the remainder to go to certain persons named in the will. The plaintiff is a niece of the testator and the defendant is his widow.

At the trial the plaintiff showed that at the date of the will William Buenger owned a certain farm in [461] St. Louis county, containing fifty arpens and known as the Franklin farm, and that at the date of the will he also owned an undivided one-half interest in the fifty-three arpens, the other half interest being at that time (less the one twenty-fourth of said other half, which was vested in the heirs of Ann T. Hume) vested in Joseph L. Hyatt. He also owned other real and personal property which is not in controversy here.

Being so possessed, said William Buenger made his will on January 29, 1889. That will was as follows:

"I, William Buenger, of the county of St. Louis, in the State of Missouri, do make and publish this my last will and testament. I am weak in body but sound in mind, and know what I am doing. After the payment of all my just debts, I give and devise unto my niece, Sophia Buenger, daughter of Henry Buenger, the farm known as the Franklin farm, situate. lying and being in the county of St. Louis, and the State of Missouri, containing fifty arpens, bounded as follows, to wit: East by lands owned by Gustavus Wittich, south by Aubuchon and Maher, west by my own, and north by the Missouri river. Also my interest in the tract of land owned by Joseph L. Hyatt and William Buenger, containing fifty arpens, to have when she attains the age of twenty-one years, to have and to hold the same forever. But if my widow should die or marry before Sophia attained the age of twenty-one years, then she is to come into immediate possession of the above described land.

"I give and bequeath unto my two brothers and two sisters. Henry Buenger, Casper H. Buenger, Riker Klostermeyer and Louisa Branderler, or their heirs, two thousand dollars, to be divided equally between them share and share alike, but my brother Henry is now dead, and I wish that the five hundred dollars that was for him to go to his three sons, William, Henry and Harmon Buenger, share and share alike, to be paid within [462] two years after this will is probated; I except Harmon Buenger's share; I wish his share of the five hundred dollars to remain in my estate until he is of age and to bear six per cent per annum until paid. Interest commencing two years after this will is probated.

"I also give and bequeath unto Charles Meyer, my nephew, the following parcels of land, now belonging to me in the Monroe tract: Nos. seven and eight, containing fifty-five acres more or less, to have and to hold forever, provided, that he

pays William Buenger and Conrad Buenger (sons of Casper H. Buenger) each one hundred dollars, and one hundred dollars to William Klostermeyer, also fifty dollars each to William and Henry Buenger, sons of Henry Buenger. This must be paid within two years after this will is probated.

"I give and devise unto my beloved wife, Mena Buenger, all of the remainder of my property, both real and personal, I may possess at my death during her natural life, excepting, however, that property which I have mentioned in the first part of this will, and if my wife should marry then I give and devise unto Annie Holtman, daughter of my wife by her first husband, the following parcels of land, Nos. twenty-three, twenty-four, and twenty-five and if my wife die before Annie Holtman then Annie Holtman shall have the whole of this property, and if Annie Holtman should die without living children of her body, then this estate, except as already provided, shall be divided equally between the following named persons or their heirs (and Annie's husband if she has any): My brother Henry and Casper H. Buenger, Riker Klostermeyer, Louisa Branderler, Theodore Wolff, Annie Kamper (the wife of August Kamper) and the heirs of Fritz Wolff (the heirs shall inherit only the parent's part).

"I hereby appoint my wife, Mena Buenger (without being required to give security), my sole executrix of this my last will and testament, hereby revoking all former wills by me made.

463 "In witness hereof, I have hereunto set my hand this twenty-ninth day of January, A. D. 1889."

The plaintiff also showed that after the execution of his will, William Buenger, to wit, on April 25, 1895, acquired the other half of the fifty-three arpens (less than one twenty-fourth thereof aforesaid) that had been owned by Joseph L. Hyatt.

This was all the evidence offered by the plaintiff, and was all the evidence adduced in the case, for the court excluded the evidence offered to be introduced by the defendant "tending to prove the circumstances, surroundings, situation, and family relations of William Buenger, the objects of his bounty, and extent and value of his estate; and also the statements of the testator made before and after the execution of the will, as to his intentions."

The court then rendered judgment in favor of the defendant, and adjudged the plaintiff to be entitled to an undivided

one-half interest in the fifty-three arpens, and the defendant entitled to a life estate in the other part acquired from Hyatt, and her daughter and the persons named in the residuary clause of the will, entitled to the remainder in that part. From that judgment the plaintiff appealed.

1. The only question presented by this record is, whether the plaintiff is entitled to the whole of the fifty-three arpens (less the one twenty-fourth aforesaid), or whether she is entitled to only an undivided one-half of the whole.

The law upon this subject has been so thoroughly and ably discussed in the prior adjudications in this state that a review of these cases will easily solve the case at bar.

One of the best considered, learned and satisfactory discussions of the subject is contained in the opinion of Leonard, J., in Liggat v. Hart, 23 Mo. 127, and because [464] of its force and clearness, the following extensive excerpt therefrom is both justified and appropriate.

The learned judge said: "Mr. Butler, in a very able note to Coke's First Institutes (191 a), after specifically pointing out the difference between the Roman and the feudal law, upon the subject of succession to the estates of deceased persons, thus forcibly sums up the contrast: 'By the Roman law, the heir was a person appointed indiscriminately by the law or the deceased to represent him, and, in consequence of that representation, was entitled to his property, and bound by his obligations. In the feudal law, the heir was a person of the blood of the ancestor, appointed by the original contract to the succession, and, in consequence of that succession, was supposed, more by the general notions of mankind than by the notions of the feudal policy, to represent the ancestor. By the Roman law, the heir succeeded to the property of the ancestor in consequence of his civil representation of him, and supposed continuation of his personal estate. In the feudal law, he acquired a national representation to the ancestor, in consequence of the feudal succession. In the Roman law, real and personal property was equally the subject of inheritance. In the feudal law, inheritance was confined to real property. The Roman heir claims as such all from the person last possessed, and nothing from the original donor. The feudal heir claims as such all from the donor, and nothing from the person last possessed.' The power of an owner to appoint a successor to his property, both real and personal, after his death, which seems to be nothing more than one of the natural rights

of property, prevailed to its full extent among the Saxons of England. When, however, upon the establishment of the Normans, the feudal system became a part of the law of England, so that tenants in fee could not alien without the consent of the lord, the power of disposing by will, as well as every other mode of aliening land, generally ceased. [465] And, although the feudal restraint upon alienation could not but gradually yield, as an unnatural limitation upon property, and accordingly many of the restraints were removed before Glanville wrote, yet the power of disposing by will was not allowed for a long time afterward, partly from the fear lest persons should be imposed upon in their last extremity, and partly from the want of that notoriety which the common law required in all transfers of real property. During the suspension of the direct power, which continued from Henry II to the latter end of Henry VIII, it was indirectly but substantially acquired, and exercised by means of uses. This indirect practice, however, of devising lands, was at length checked by the statute of the 27th Henry VIII, which, transferring the legal estate to the use, extinguished for a time the separate equitable ownership, and with it the incidental power of devising. The consequence was, that lands again became generally unalienable, except by a conveyance, to take effect in the lifetime of the proprietor; but the legislature found it necessary, within a few years afterward, to allow of testamentary dispositions of land, and for that purpose the statute of wills was passed, in 31 Henry VIII, and amended in the 34th of the same king (1 Powell on Devises, c. 1; Cruise on Real Property, tit. 38, c. 1).

"While the power of disposing of lands by will was exercised by means of uses, the will being considered the mere appointment of a use, it was holden that it could only operate on lands of which the party was possessed at the time, and could not affect any lands subsequently acquired; and the courts accordingly adopted the same narrow principle when they came to put a construction on the statute of wills; and, therefore, although the idea of a real devise was, as Lord Mansfield remarked (Cowp. 303), derived from a Roman will, which was the appointment of an heir to succeed to the property and to discharge the obligations of the ancestor, [466] including his testamentary donations, yet it was treated in the English law not like an English will of personal property, when the executor corresponds with the instituted heir of the Roman law, but as

a particular conveyance of the lands embraced in it, and was subjected, in the particular now under consideration, to the rules applicable to such conveyances, instead of being treated as a testamentary disposition to take effect after the death of the disposer. It accordingly became a settled rule in the construction of the English statute of wills, that, if a testator devised all the real estate of which he should be seised at the time of his death, and after the making of the will he purchased lands in fee, such after-acquired property, whether it was conveyed to the testator or to a trustee for him, did not pass by the will, but descended, as to the legal inheritance in the former case, and as to the equitable in the latter, to the testator's heirs at law (1 Jarman on Wills, 85; Bunter v. Coke, 1 Salk. 237; S. C., 3 Brown Parl. C. 19); and the reason of this was, not on account of the intent on the part of the testator, but because he had no legal power to dispose by will of land which he did not own at the time; and the reason given for this construction was not merely that a limited testamentary power was conferred by the very words of the act, but because such was the legal consequence, in the absence of any express provision to the contrary, of considering a devise, not in the nature of a will, but of a particular conveyance. Under the old law, therefore, when a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his testamentary power, and it accordingly took effect as a gift of such real estate as belonged to him at the time of the execution of the will, and as to the personalty as a disposition of whatever he should possess at the period of his decease; and this construction has prevailed in the United States, wherever the British statute of wills [467] has been adopted, either by express enactment, or as a part of the general system of law.

"Lord Mansfield once remarked, that common sense would never teach a man the difference between the testamentary gift of a horse and a house, and that, originally, the construction might as well have been otherwise, but that it was then too well settled to be disturbed. Indeed, experience has at length taught the British nation that it had better have been settled otherwise from the beginning, as the construction given has been found to defeat the real intention of testators, and accordingly they have remedied the evil in 1 Victoria, chapter 26, by providing that testators may dispose of all the real and personal estate to which they may be entitled at the time of

their death, and that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and the result is, that the distinction in an English will between real and personal property, that was not obvious to common sense in the days of Lord Mansfield, is now abolished, and an English devise of land operates now as a will of personal property did before the passage of the late act, and passes whatever real estate the testator may possess at the time of his death, unless a contrary intent appear. It is also to be remarked that the same experience that produced the British amendment act upon this subject has resulted substantially in the same enactments in the several states where the English rule of interpretation had been introduced and prevailed. Accordingly, in Massachusetts, at their revision in 1835 (Rev. Stats. 417, sec. 3), it was provided, that after-acquired real property should pass by a will, in like manner as if it were possessed at the time of the making of the will, if such appeared to be the intent of the testator; and similar enactments have been adopted in Maine, New Hampshire, New York, Pennsylvania [468] and other states: Winchester v. Forster, 3 Cush. 366.

"The Virginia statute of 1785 expressly extends the testamentary power to the real property which the testator may have at his death, and was followed in this particular in Kentucky and Illinois; and the result of the decisions in these states is, that after-acquired lands pass, when such appears to be the intention of the testator, although in Virginia they retain the rule adopted in England, that the words of the testator, in reference to his real property, are to be understood as referring to the time of the making of the will, unless a different intent appear: Turpin v. Turpin, 1 Wash. (Va.) 75; Allen v. Harrison, 3 Call (Va.), 297; Warner's Exrs. v. Swearingen, 6 Dana. 200; Willis v. Watson, 5 Scam. 66. The legislation in our own state has been somewhat peculiar. The first act upon the subject, passed in 1897, was copied from the Virginia statute of 1785, and confers, in one section, upon persons of full age, testamentary power over all real estate, then owned, or which the testator may have at his death; and in a subsequent section, confers testamentary power over the personal estate, in general terms, upon persons who are over eighteen years of age. The law so continued without any change, until the revision of 1835,

when, under the plan of revising then adopted, of dropping what were deemed superfluous words, the phraseology was changed to what it now is, and the testamentary power, over both real and personal property, was incorporated into one section, and conferred in the same general words; and the same phraseology was continued in the revision of 1845, and we presume also in the last revision. The language now used, however, is not the language of the old English statute, 'that any person having an estate may dispose of it at his pleasure,' etc.; but that every person may, 'by last will devise all his estate, real, personal and mixed,' etc.

"No doubt is entertained but that, under the act [469] of 1807, after-acquired real property would pass by will, whenever such appeared to be the intention of the testator. The reason why it did not pass under the English statute was the want of testamentary power; and that power being expressly given by our original act, the objection was out of the way; and such seems to have been the construction given to the statute in Virginia, Kentucky and Illinois.

"But the question is as to the construction of the present law. Must we hold that the act now in force does not confer testamentary power over after-acquired land, and, on account of the change in the phraseology of the statute, which was made in 1835, go back to the construction put upon the original statute? We think not. The language now used does not require such a construction at our hands. It is different from the language of the English statute of wills. The testamentary power is given here in general language; it embraces both real and personal estate, and is a power to make a testamentary disposition of all the testator's property, without any distinction between real and personal property, and not a mere power of particular disposition. It is more in the nature of a Roman will than an English devise of real property. But, however this may be, when we consider the plan of revising that was adopted—the impolicy of creating changes in laws of daily practical importance—the little probability, when all around us were abandoning the old, narrow construction of the testamentary power, that our legislature should adopt it, for the first time, by an express provision for that purpose—and when we consider too, that neither the community nor the profession have generally, as we believe, been aware of the supposed change—and that men have generally acted as if the original act of 1807 were still in force, and that estates have been ad-

ministered and distributed accordingly—we do not think that we would be warranted in declaring that the legislature, by the change in the language, [470] intended to affect the substantial change in the meaning of the law that is supposed, and we shall accordingly give to the act, as it now stands, as literal a construction in favor of the testamentary power as we should have felt constrained to have given to the original act."

The learned judge then applied the principles of law so declared to the facts in judgment, and pointed out that after a specific devise of a watch to one and a burial lot to another, the will in that case provided: "I hereby direct my executors to sell the whole of my real, personal and mixed property," and, after the payment of his debts and the sum of one hundred dollars to such of his nephews as should be named James, he directed the proceeds of such sale "to be sent to my executors in Ireland" to be there invested for the use of his brothers and sisters. And it was held the will applied as well to property acquired after the will was made as to the property owned by the testator at the date of the will. And there can be no two minds as to the correctness of the conclusion there reached, for the devise was practically of the whole estate to the same beneficiaries. As applied to the case at bar that opinion is not only valuable for its historical data, but also for the rules of law laid down. This is especially true as to the evolution of the statute of wills in this state from 1870 to 1856 when the opinion was written.

The statute of wills of 1845 (Rev. Stats. 1845, c. 185, sec. 1) and of 1855 (Rev. Stats. 1855, c. 167, sec. 1) provided: "Every person of twenty-one years of age, and upward, of sound mind, may, by last will, devise all his estate, real, personal and mixed, and all interest therein, saving to the widow her dower." And section 2 of the revisions of 1845 and 1855, relating to wills, provided: "Every person over the age of eighteen years, of sound mind, may, by last will, dispose of his goods and chattels."

There is no substantial difference, so far as concerns [471] this case, between that statute and the act of 1879, which was in force when this will was made on January 29, 1889. The act of 1879 (Rev. Stats. 1879, c. 71, sec. 1), provided: "Every male person, twenty-one years of age and upwards, of sound mind, may, by last will, devise all his estate, real, personal, and mixed, and all interest therein, saving the widow her dower. And every male person over the age of eighteen years, and of sound

mind, may, by last will, bequeath all his personal estate, saving the widow her dower."

It is unnecessary here to refer to the power given to married women to make wills.

There is, therefore, no material difference, so far as concerns this case, between the statutes that were in force when Liggat v. Hart, 23 Mo. 127, was decided, and the statutes as they are to-day.

Liggat v. Hart, 33 Mo. 127, was cited and followed in Applegate v. Smith, 31 Mo. 166. In that case the testator lived in Kentucky and made his will there. He devised to his wife "his whole estate, real, personal, and mixed, wherever situated." He afterward purchased land in Missouri, and the only question was whether the after-acquired land passed to the devisee. In that case the devise was of the whole estate, and Scott, J., said: "The only material point in this case is whether the after-acquired lands passed by the devise to Martha Applegate. The will was made in Kentucky, and by the law of that state there must be something in the will itself which showed that the after-acquired lands were intended to be passed by it in order that it may have that effect. A general devise of all his property, or of all his estate, or a general disposition of his land, will not authorize such a deduction. But his intention to devise whatever interests he may own in land at his death must be disclosed by the language used, or by the actual import of the provisions contained in the will." It was pointed out, however, that as the land lay in Missouri, the laws of this state would govern, and that under [472] the laws of this state a nonresident owner of lands in this state was allowed to make a will of such land, and it was held that the law as to after-acquired land was correctly laid down in Liggat v. Hart, 23 Mo. 127.

Here again it will be observed the devise of the whole estate was to the same beneficiary, and the only question, therefore, was whether the will covered the after-acquired property or whether as to that the testator died intestate.

The question here involved next came before this court in Hale v. Audsley, 122 Mo. 316, 26 S. W. 963. That case turned upon the construction of the will of Charles Sterne. The second paragraph of that will gave his wife a life estate in his home place, with a remainder in fee to his granddaughter and her heirs. The third paragraph of that will gave his granddaughter and her heirs another tract of about seven hundred

acres, and added: "And I further will and devise to my said grandchild and the heirs of her body, any and all other real estate, I may now have or hereafter may acquire, wherever situated," etc. The fifth paragraph of that will also gave to his granddaughter "an undivided interest of one-third of what is called the Latham farm," containing three hundred and twenty acres. The sixth paragraph of that will provided that if his granddaughter died without issue or heirs of her body, the "real estate hereinbefore mentioned and described" should go to the testator's nephews and nieces in equal parts, but if his said grandchild left heirs of her body surviving her the land should go to them in fee.

That case involved the right of said granddaughter to convey an one-sixth interest in the Latham farm. At the date of the will, the testator and one Hale owned each an undivided half of the two-thirds interest in the farm, and one Branch owned the other one-third. After the execution of the will, the testator and Hale purchased Branch's one-third interest, and held it in undivided [473] shares of one-sixth each at the time of the testator's death.

Black, J., speaking for this court, said: "The question is, whether the one-sixth interest acquired by Sterne (the testator) after the date of the will passed to the plaintiff (the granddaughter) Lelia and the heirs of her body by force of the residuary clause in the third paragraph of the will or to her absolutely under the fifth paragraph. Real property acquired after the date of a will will pass to the devisee, where it appears from the will that the testator intended to thereby dispose of such after-acquired property, and it will pass according to the intention of the testator the same as in case of property owned by the testator at the date of the will: Liggat v. Hart, 23 Mo. 127; Applegate v. Smith, 31 Mo. 166. This will appears to have been prepared with care, and it seems to us its meaning is clear and not open to two constructions, and that the undivided one-sixth passed to Lelia by virtue of the residuary clause in the third paragraph. The fact that this clause is found in the third paragraph and not in the fifth or some subsequent part of the will is wholly immaterial. This residuary clause in the most express terms disposes of any after-acquired real estate, and it also disposes of all real estate owned by the testator at the date of the will, not thereby specifically devised. The question, then, is whether the language of the fifth paragraph can be expanded so as to include this one-sixth.

"At the date of the will the testator owned a one-third interest in the Latham farm. It is this interest he is speaking of when he says he devises to Lelia 'an undivided interest of one-third in what is commonly called the "Latham Farm"'; and in the same paragraph he again speaks of this interest as 'my said interest of one-third in said Latham farm.' It is perfectly [474] manifest that the testator in making this devise had in mind only the interest which he then owned, and it was this interest of one-third, and this only, that he undertook to dispose of by this paragraph. To say the testator intended to give this after-acquired interest of one-sixth to Lelia upon the terms named in the fifth paragraph is to make a codicil for him when he did not see fit to make one himself. This we cannot do. We have no power to deal with testaments in any such way. It is true we must construe the will from a consideration of all its parts and in the light of the surrounding circumstances under which it was written, but we cannot change the plain, clear and emphatic language of the testator. The fifth paragraph disposes of a one-third interest and no more. The trial court held that the after-acquired one-sixth passed by the fifth paragraph, and in this it erred. The judgment is reversed and the cause remanded to be tried on the construction of the will here pointed out."

The difference in that case was that under the residuary clause contained in the third paragraph of the will the devise was to the granddaughter and her heirs, whereas, under the fifth paragraph, the devise was to the granddaughter absolutely. The trial court held that the granddaughter took the after-acquired one-sixth interest in the Latham farm, under the fifth clause of the will, and this court held that to be error, and that the granddaughter took such after-acquired interest under the third clause of the will.

The gravamen of that case is in the following words: "Real property acquired after the date of a will will pass to a devisee, where it appears from the will that the testator intended to thereby dispose of such after-acquired property, and it will pass according to the intention of the testator at the date of the will: Liggat v. Hart, 23 Mo. 127; Applegate v. Smith, 31 Mo. 166."

And in that case the intention of the testator as to [475] the Latham farm was ascertained from the fifth paragraph of the will to be that he only intended to give her absolutely the undivided one-third interest therein that he owned at the date of the will, and therefore the after-acquired one-sixth interest in

said farm passed to her and the heirs of her body under the residuary clause of the will.

That decision as applied to the facts in judgment here would result in holding that the testator intended to devise to his niece, the plaintiff herein, by the first paragraph of the will his undivided one-half of the fifty-three arpens that were owned by him at the date of the will, and that as the other undivided one-half interest therein was then owned by Hyatt, the testator did not intend to devise that. But that as the testator acquired Hyatt's undivided interest in said fifty-three arpens after the date of the execution of the will, he intended that it should pass under the residuary clause of the will to his wife for life, with remainder in fee to the persons named in the residuary clause.

The question was again before this court in Webb v. Archibald, 128 Mo. 299, 34 S. W. 54. That case turned upon a construction of the will of Mrs. Margaret Lindsay. By the first clause of her will the testatrix bequeathed to her daughter, the plaintiff, Kate Webb, three thousand seven hundred and fifty dollars to be invested in land for her sole use. By the second clause of the will the testatrix bequeathed four hundred and twenty acres of land, which was therein described to be "all of my real estate," to her three children, Thomas Archibald, William Archibald and Margaret Winkler, and to her grandson, Harry Archibald, and their heirs and assigns, each to have one-fourth of said real estate. By the third clause of her will the testatrix bequeathed to her son, William Archibald, one thousand dollars, for the purpose of making him even with her other children. This will then concluded as follows: "Out of the balance of my property I desire my debts to be paid, and should [476] there be anything left, I desire it to be equally divided between Thomas Archibald, William Archibald and Margaret Winkler; above named are all of my children, as I have never had any children by my present beloved husband, Clark Lindsay."

Between the date of her will and the date of her death, the testatrix acquired another tract of land of one hundred and twenty acres, and also several thousand dollars worth of personal property.

The plaintiff claimed one-fourth of such after-acquired real and personal property by descent, upon the theory that as to such after-acquired property Mrs. Lindsay died intestate The trial court took this view and rendered judgment accordingly.

This court reversed the judgment and held that the after-acquired property passed, under the residuary clause of the will, to Thomas Archibald, William Archibald and Margaret Winkler, the other children of the testatrix, and that it was the intention of the testatrix that as the plaintiff had been fully provided for by the first clause of the will, and as she was not named as one of the residuary legatees in the will, she was not entitled to any part of the after-acquired property.

Brace, J., speaking for the court, solved the legal questions involved in such clear and convincing terms that they throw a flood of light upon the case at bar. He said:

"In the leading case of Liggat v. Hart, 23 Mo. 127, Leonard, J., said: 'Men know that their wills are not to take effect until they die, and they make them for the purpose of fixing the distribution of their property from that moment.' Since that decision, construing the first section of our statute of wills, there never has been any question in this state but that the language of a will is to be construed as of the date of the decease of the testator, unless the contrary appears to have been his intention, and that the will operates upon all the estate of the testator, real and personal at the time of [477] his decease, so far as its terms are applicable, unless the intention of the testator appears to be otherwise: 1 Redfield on Wills, 3d ed., c. 9, sec. 1.

"The language of the will in question leaves no room for doubt that the testatrix in the disposing clauses of her will was fixing the distribution of her property 'from the moment of her death.' The first item of her will, containing the legacy to the plaintiff, discloses this as her thought in the expression 'on my death,' which runs through the dispositions of the will. Nor does that language leave any room for doubt that the testatrix intended to dispose of all the property of which she was possessed at the moment of death, for, after making all the specific bequests she desired, she closed the third and last item with a residuary clause disposing of 'anything,' 'out of the balance of my property.'

"There is nothing in the language of the will, nor rules of law given for its interpretation upon which the idea of an intestacy as to any of the testatrix's property can be predicated. There is no room in the case for the indulgence of any presumptions on account of a disherison. There is no disherison in the case. The testatrix carefully named all those who by nature had immediate claims on her bounty, and as carefully

provided for them. That the provision made by her may have been unequal as between them can furnish no basis for a presumption that she intended an intestate as to any of her property; yet, in order to sustain the trial court in its ruling, we should not only have to indulge in some such presumption, but permit it to override, not only the foregoing well-settled principles of law for the construction of the testatrix's will, but her unequivocally expressed intention as to the share the plaintiff should have in her estate; for nothing can be clearer than that it was the intention of the testatrix, not only that the plaintiff should have no interest in the testatrix's landed estate, but that her husband should have no interest in [478] such estate, or in any lands that might come to her by means of the legacy left in the will. In both respects the intention of the testatrix would be defeated by the ruling of the trial court that she died intestate as to the 'Winfrey Farm.'

"This brings us to the only remaining question: To whom did that farm pass by the will? It passed either by the second item or the residuary clause of the third item of the will. Reading these items together it is impossible to escape the conclusion that the intention of the testatrix was to make a difference between her three children and her grandchild named therein—that there was a part of her estate in which she wished that they should all share equally, and there was a part of her estate in which she wished that only her said three children should share equally and in which her grandchild should have no share. The estate in which the four should share equally was devised by the second item. It was a landed estate. The disposing part of that item is 'all my real estate.' This expression, if there had been nothing more, would have been sufficient to pass all her real estate, including any that she might have acquired after the execution of the will. She did not stop there, however, but immediately, in the same item and connection, proceeded to define those terms, by giving her meaning thereof to be the 'farm on which I now live' and the timber land south of it. It is not material that she may not have given correctly the number of acres therein. There is no difficulty in identifying the land devised, and it was in these particular lands that the four were to share equally at her death. For purposes of description she referred to an existing state of things, thus giving an illustration of the exception to the general rule, hereinbefore stated, that the language of the will is to be interpreted as having been used with reference to the

time of the death of the testator, the exception being, in the language of Ellsworth, J., in Gold v. Judson, 21 Conn. 616, that 'wherever a testator [479] refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word "now."'

"The estate in which her three children, Thomas Archibald, William Archibald and Margaret Winkler, were to share equally, but in which the grandchild, Harry Archibald, was to have no part, was devised in the residuary clause of the third item of the will, and it was to be anything left of her property after her debts were paid, not included in the specific bequests —anything left, whether of real or personal property."

The rules that result from these cases, therefore, may be briefly stated to be as follows: 1. The intention of the testator is the controlling guide, and that intention must be gathered from the four corners of the will, in the light of the circumstances under which it was written; 2. If the devise is of the whole estate of the testator to the same beneficiary, it will pass after-acquired property as well as all that he owned when the will was made; 3. If the devise is of a particularly described interest in certain land to a particular devisee, and if there is a devise of the residuum of his estate to other particularly named devisees, or to his heirs generally, then any after-acquired interest in the property mentioned in the particular devise will pass under the residuary clause to the persons therein named, and will not go to the particular devisee named in the particular devise of the particular interest.

It only remains to apply these rules to the case at bar. The testator first provided for the payment of his debts. Then he made provision for his niece, the plaintiff herein, by giving her the Franklin farm of fifty arpens, and also gave her "my interest [which at that time was an undivided one-half] in the tract of land owned by Joseph L. Hyatt and William Buenger" (the testator), which contained fifty-three arpens. He then gave his two brothers and sisters, or their heirs, two [480] thousand dollars in equal parts. He next gave his nephew fifty-five acres of land, on condition that he paid certain specified sums, within a specified time, to certain persons named. And having thus specifically provided for his other relatives and family, his mind turned to his wife and her daughter by her first marriage, and by the residuary clause of his will he de-

vised "unto my beloved wife, Mena Buenger, all of the remainder of my property, both real and personal I may possess at my death, during her natural life, excepting, however, that property which I have mentioned in the first part of this will." He then provided that if his wife should marry, he devised certain of said residuum to his stepdaughter, and if his wife died before his stepdaughter, the latter should have "the whole of this property," and if his stepdaughter died without issue, "then this estate except as already provided shall be equally divided" among his brothers and sisters.

Thus the intention of the testator clearly appears to be to give the plaintiff the whole of the Franklin farm and the half of the fifty-three arpens he then owned and of which Hyatt owned the other half, and to give his wife "all the remainder of my property, both real and personal, I may possess at my death, during her natural life, excepting that property mentioned in the first part of this will," and the remainder to go as above explained. This is the only provision he made in his will for his "beloved wife."

Thus it appears that the devise to the plaintiff was of a particular interest in particular land, whereas the devise to his wife covered all his property, real and personal, except what he had particularly given to plaintiff and the fifty-five acres particularly given to his nephew. Not only this, but the devise to the plaintiff was of the particular interest in the tract of land "owned by Joseph L. Hyatt and William Buenger." While the devise to his wife was of "all the remainder of my property, [481] both real and personal, I may possess at my death." The devise to the plaintiff, therefore, related to and covered only a particular interest in a particular tract of land, owned by him at the date of the will. Whereas the devise to the wife covered not only the residue of all real and personal property that he owned at the date of the will, but also the residue of all, "I may possess at my death," thereby intending to give to his wife any property he might acquire between the date of the execution of the will and the date of his death.

The circuit court, therefore, properly held that the after-acquired interest in this case passed under the residuary clause of the will to the persons therein named, and not to the plaintiff under the first clause of the will, and the judgment must be affirmed.

All concur, except Robinson, J., absent.

After-acquired Property will pass under a will if such appears to have been the intention of the testator: Wynne v. Wynne, 23 Miss. 251, 57 Am. Dec. 139; Clayton v. Hallett, 30 Colo. 331, 97 Am. St. Rep. 117; Brown v. Hamilton, 135 N. C. 10, 102 Am. St. Rep. 526. But the common law seems to have been otherwise, and it has been held that lands acquired after the execution of a will do not pass by a devise in the residuary clause: Bruen v. Bragaw, 4 N. J. Eq. 261, 38 Am. Dec. 519; Girard v. Philadelphia, 4 Rawle, 323, 26 Am. Dec. 145.

REDMON v. METROPOLITAN STREET RY. CO.

[185 Mo. 1, 84 S. W. 26.]

STREET RAILROADS—Negligence—Care Required of.—Street-car Companies are carriers of passengers, and are held to the same degree of care and vigilance in preventing injury to them as is required of other railroads carrying passengers for hire; that is to say, the highest care and skill which prudent men would use and exercise in a like business and under like circumstances. (pp. 561, 562.)

STREET RAILROADS—Negligence—Prima Facie Case—Burden of Proof.—If a street-car company has exclusive control of its street-car and the apparatus propelling it, a passenger who shows that he was injured while sitting in his seat in such car, by its stopping suddenly and abruptly, makes out a prima facie case of negligence against the company, and the burden is then cast upon it to show that the accident was not the result of a want of care and skill, such as is imposed upon common carriers. (p. 562.)

EVIDENCE.—Res Gestae are those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act, and which in contemplation of law are a part of the act itself. (p. 563.)

EVIDENCE—Res Gestae.—A statement made by a street-car conductor to an injured passenger at the time the latter is being removed from the car, in explanation as to the cause of the accident, is not admissible in evidence as part of the res gestae. (p. 564.)

EVIDENCE—Narrative of Agent.—A statement made by a street-car conductor to an injured passenger while the latter is being removed from the car, in explanation of the cause of the accident, is not admissible in evidence on the ground that the car conductor was the agent and representative of the railroad company and made the statement by authority to a passenger who had the right to demand the cause of injury. (p. 564.)

AGENCY.—Admissions or Declarations of an Agent bind his principal only when made during the continuance of the agency in regard to the transaction then pending. (p. 564.)

EXPERT EVIDENCE—Cause of Injury.—An expert medical witness is competent to give his opinion upon a hypothetical question based upon the facts in evidence, that an injury was the cause of a disease or condition found in the injured person. (p. 566.)

J. H. Lucas, for the appellant.

Neal & Eppstein, for the respondent.

[5] GANTT, P. J. This is an action for damages alleged to have been caused to the plaintiff by the negligence of the defendant.

On the afternoon of October 8, 1900, the plaintiff, while a passenger on a cable car of defendant, was injured by the sudden and violent stoppage of the car near the intersection of Ninth street by Walnut street.

The petition alleges the incorporation of the defendant and its ownership of a street railway over and along Ninth street; that as such street railway company it was a common carrier of passengers for hire, charged with all the duties and liabilities of such common carrier; that at all the times complained of and prior thereto the cars and trains of defendant were propelled and operated by means of an endless or continuous cable or wire rope, which was caused to move by machinery [6] driven by steam power, and which cable was grasped by a device attached to its cars called a grip, which caused the cars to move with said cable or wire rope, which grip was operated by the servants or agents of defendant, who caused said grip to grasp and release said cable at the will of the operator; that defendant usually ran its cars in trains of two cars each, and the injury of which plaintiff complains was done while plaintiff was occupying the rear car of a train of two cars as hereinbefore shown; that on October 8, 1900, he entered the rear car of said train of defendant, at a point west of Walnut street, on Ninth street, for the purpose of going east to its termination; that plaintiff complied with all the requirements of defendant, and became a passenger on said car of defendant and as such occupied a seat in said car; that while lawfully occupying said seat as such passenger as aforesaid and entitled to all the rights, privileges, care and protection which defendant owed to its passengers, and while plaintiff was in the exercise of due care, when said cars reached Walnut street, and while making a high rate of speed, the said cars, by reason of the carelessness and negligence of the defendant, its agents and servants, came to an instant, abrupt, unusual and sudden stop, whereby plaintiff was thrown with great violence from his seat in said car against the stove, seats, sides and floor of the said car, by which he received and sustained great bodily injuries, to wit, three of his ribs were broken, and he suffered internal injuries in

his intestines and bodily organs, and his heart and liver were deranged and enfeebled, and his bowels partially paralyzed, and he was permanently injured, etc., for which he prayed damages in the sum of thirty thousand dollars.

The answer admitted the incorporation of defendant, and denied all other allegations in the petition, and also pleaded contributory negligence. The cause was tried, and a verdict of three thousand dollars rendered in favor of plaintiff [7] and judgment accordingly. After motions for a new trial and in arrest of judgment had been filed and overruled, the defendant appealed to this court.

The facts developed on the trial are substantially these:

The plaintiff is about forty years old. About 3 o'clock in the afternoon of the 8th of October, 1900, he took a seat in one of defendant's street-cars on Ninth street, intending to go to his home in Independence, Missouri. He got on the car at what is known locally as "the junction" of Ninth and Main streets. His car was going east. The next street east is Walnut street. As he was in the act of paying his fare, the train of two cars came to an abrupt and sudden stop. The plaintiff was shocked and rendered insensible at first, but recovered consciousness while the conductor and some one else were removing him from the car. The plaintiff inquired of the conductor the cause of the trouble, and was told that a coupling-pin had fallen from the car into the slot rail. This evidence was objected to at the time but admitted by the court.

Peter Martin, an employé of defendant at the time, and who had worked for the defendant thirteen years, testified he was a flagman at the Walnut and Ninth street crossing, for defendant, on the day of the injury to plaintiff, and remembered the accident. He had been on duty at the crossing of Walnut street by the Ninth street cars of defendant up to 3 o'clock that day, when another flagman took his place. He was standing on the north side of Ninth street and on the west side of Walnut street, waiting for a car to go to Westport, or to Fifteenth and Grand avenue. Had been there only a short time. The accident happened while he stood there. The Ninth street car came up the incline on Ninth and came to a sudden stop when it hit Walnut street. The car struck there for a few minutes. The wrecking wagon soon came. Ben Lee was the driver, and George Hall, the rope-splicer of defendant, was [8] there, and the other flagman. John Evans was there also in a few minutes. The car had not reached clear up on Wal-

nut street when it stopped. The grip car stopped on the first track on Walnut street. The train was composed of a grip car and one coach. The train stopped with a jar or shock. When the wrecking wagon came, the car was shoved west, and the wreck cleaned up and the train started again. The wreck caused a delay of five minutes or possibly ten minutes. He saw one man helped out and taken to the sidewalk. He had his hand on his forehead. He saw something taken out of the slot rail. Couldn't say whether it was a bolt or a pin. "I saw them taking it out of the slot rail, and the men took whatever it was away. I think it was one of the railroad men that took it, but don't know which one it was." All the cars of the Ninth street line have drawheads in each end. The coupling-pins were bolts about six inches long and seven-eighths of an inch in diameter, which held the links which connected the cars.

On cross-examination he stated that the cars on Ninth street passed this crossing sometimes every two minutes, and sometimes it was fifteen minutes between cars. The cars had been running regularly on the day of the accident and there was no stoppage until the car on which plaintiff was riding suddenly stopped. No other car so stopped that day to his knowledge. There was something in the slot rail to stop the car. It was taken out so quick he didn't know what it was. He didn't take it out himself, but to the best of his recollection one of defendant's men took it out, but he didn't know which one of them it was.

There was evidence that plaintiff's fourth, fifth and sixth ribs on the right side were dislocated from their attachment to the bones of the back, knocked forward something like an inch; that his heart and spine were affected; that his bowels would not act without medicine. The evidence as to the extent and permanency of [9] his injuries was conflicting, and it suffices on this point to say that there is nothing in the verdict indicating that it was the result of prejudice or passion.

1. It is earnestly argued and urged by counsel for defendant that the demurrer to the evidence should have been sustained and that the circuit court committed reversible error in not so doing. This contention must be settled by a review of the testimony in the light of the law governing defendant's liability as a carrier of passengers. It is the settled law of this state that street-car companies are carriers of passengers, and held to the same degree of care and vigilance in prevent-

ing injuries to their passengers as is required of other railroads carrying passengers for hire—that is to say, the highest care and skill which prudent men would use and exercise in a like business and under like circumstances: Jackson v. Grand Ave. R. R. Co., 118 Mo. 199, 24 S. W. 192; O'Connell v. St. Louis etc. Ry. Co., 106 Mo. 482, 17 S. W. 494; Clark v. Chicago etc. Ry. Co., 127 Mo. 197, 29 S. W. 1013; Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

In the case last cited the rule announced in Stokes v. Saltonstall, 13 Pet. 181, 10 L. ed. 115, was approved, to wit, that "when damage or injury happens to a passenger by the breaking down or overturning of the coach, the presumption, prima facie, is that it occurred by the negligence of the coachman, and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them, by satisfactory proofs, to repel every imputation thereof."

In Carpue v. London etc. Ry. Co., 5 Ad. & E., N. S., 747, where the injury was caused by a train running off the track and overturning the carriage in which the plaintiff [10] was a passenger, Denman, C. J., told the jury that, "It having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause."

In this case the defendant was the owner of, and in exclusive control of, the track on which it propelled its cars; plaintiff was a passenger in its cars, and while sitting in his seat he was injured by the sudden and abrupt stopping of the car; in a word, the injury arose from apparatus wholly and entirely under the control of defendant and furnished and operated by it, and such being the case, we think the plaintiff made out his prima facie case of negligence against the defendant and the burden was cast upon defendant of showing that the accident was not the result of that want of care and vigilance which the law makes it obligatory on defendant to bestow: Hipsley v. Kansas City etc. R. R. Co., 88 Mo. 348.

In Dougherty v. Missouri R. R. Co., 81 Mo. 325, 51 Am. Rep. 239, it was said: "Without reviewing the authorities, the

following proposition is clearly deducible: That where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as, under an ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Now, it requires no argument or proof to establish that an accident such as this, in the ordinary course of things, would not happen if the owners and operators of street-cars use proper care in the management of their cars and the maintenance and inspection of their tracks, slots and underground crossings, and the case, therefore, in the first instance, is one in which plaintiff was entitled to the presumption of negligence, [11] or, in other words, had made out his prima facie case when he closed his evidence, independent of the statement of the conductor to him that the accident had been caused by a coupling-pin falling into the slot rail, and accordingly no error was committed in overruling the demurrer to the evidence, either at the close of plaintiff's case or at the close of all the evidence.

2. It is, however, urged that manifest error was committed in admitting, over defendant's objection and exception, the statement of the conductor to the plaintiff after plaintiff had been hurt in explanation of the cause of the sudden stop of the train.

Plaintiff urges it was admissible on two grounds: 1. Because made by the conductor, the agent of the defendant in charge of the train, to an injured passenger who had the right to make the inquiry; 2. Because it was a part of the res gestae. Considering the second proposition first, it may be said that the courts do not differ materially as to what the doctrine of res gestae is, but they are hopelessly variant in its application.

The res gestae may be defined as those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act—indeed, must be in contemplation of law a part of the act itself. Narratives unconnected with the principal facts are universally rejected. Applying this general rule, a statement by a motorman after a child had been run over by his car and while the car was still standing in the street was rejected in Ruschenberg v. Southern Electric Ry. Co., 161 Mo. 79, 80, 61 S. W. 626, following Barker v. St. Louis etc. Ry. Co., 126 Mo. 143, 47 Am. St. Rep. 646, 28 S. W. 866, 26 L. R. A.

843, and Adams v. Hannibal etc. R. R. Co., 74 Mo. 553, 41 Am. Rep. 333.

If those cases are to be followed, and we think they should be, the admission of the statement of the conductor cannot be sustained as a part of the res gestae. On its face it is a narrative of what had happened [12] and the cause thereof and elicited by a question as to the cause of the trouble.

Was it admissible on the ground that the conductor was the agent and representative of the company and made the statement by authority and to a passenger who had the right to demand the cause of his injury?

This must be solved by the application of the law of principal and agent. The admission or declaration of his agent binds the principal only when it is made during the continuance of the agency in regard to the transaction then depending. This must be regarded as settled law in this state: Rogers v. McCune, 19 Mo. 557; McDermott v. Hannibal etc. R. R. Co., 73 Mo. 516, 39 Am. Rep. 526; Adams v. Hannibal etc. R. R. Co., 74 Mo. 555, 556, 41 Am. Rep. 333; Aldridge v. Midland etc. Furnace Co., 78 Mo. 563; Devlin v. Wabash etc. Ry. Co., 87 Mo. 545; Barker v. St. Louis etc. Ry. Co., 126 Mo. 148, 47 Am. St. Rep. 646, 28 S. W. 866, 26 L. R. A. 843.

Applying the rule just stated, the question arises in each case, Were the statements of the agent contemporary with the transaction and illustrative of its character, or merely a subsequent narrative of how it occurred or an explanation of how it might have been avoided? If the latter, they are inadmissible. Considered with reference to this particular case, it must be conceded that in point of time they came very quickly after the accident and wreck, but though thus soon after the collision, it seems to us to be apparent it was a recital of the cause of it, and no part of the transaction while passing, and the statement for this reason falls within the doctrine announced by Judge Scott in Rogers v. McCune, 19 Mo. 557, and uniformly adhered to by this court in subsequent decisions: Koenig v. Union Depot Ry. Co., 173 Mo. 698, 73 S. W. 637.

This admission of this evidence cannot be said to be harmless. Coming as it did from the conductor of the train, it was calculated to carry conviction that the cause of the accident was the falling of the coupling-pin into the slot—a fact, if true, that tended to make [13] a case of negligence as between a carrier and one of its passengers, in and of itself.

We think the admission of this evidence was reversible error.

3. The contention that the instructions were too broad and should have restricted the jury to finding negligence as to the presence of a pin or bolt in the slot rail, we think is not well taken. The cause of injury was alleged to be the sudden violent stopping of the car and the resulting shock to plaintiff. The insistence that the cause of the stop was known and, that, therefore, the burden was on plaintiff to show how the obstruction, whatever it was, got into the slot and was not shifted to defendant, we think cannot be maintained. It was not a conceded fact in the trial that a coupling-pin had fallen into the slot as plaintiff attempted to prove. This was strenuously controverted by defendant's witnesses. The plaintiff was a passenger. He was without fault. The sudden unusual stopping of the car shocked him and caused whatever injury he suffered. The defendant was in the exclusive control and management of its train, and of its track and underground appliances provided for the crossing of its tracks on Ninth street by its tracks on Walnut street. There was evidence that some kind of bolt or piece of iron was taken out of the slot, but whatever it was, it was taken away by defendant's own servants, and the character of it was peculiarly within the knowledge of the defendant, and the burden devolved upon it of showing how and why the sudden stop occurred.

"Where the thing is shown to be under the management of the defendant or its servants, and the accident is such as in ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose [14] from want of care": Scott v. London Dock Co., 3 Hurl. & C. 601, 5 Q. B. 411; Clark v. Chicago etc. Ry. Co., 127 Mo. 197, 29 S. W. 1013; Guffey v. Hannibal etc. R. R. Co., 53 Mo. App. 462.

The burden was on defendant to show that the obstruction was in the slot without negligence on its part, and this it undertook to do by showing its inspection of the cars and tracks. Whether it did so to the satisfaction of the jury was a matter for the jury under proper instructions.

The peremptory instruction asked by defendant was properly refused.

The other instructions given covered the issues in the case and were fair and liberal to the defendant.

4. The only remaining point necessary to be determined at this time is the alleged error in the admission of the evidence

of Dr. Hannawalt. The contention is that the jury were as competent as Dr. Hannawalt to pass on the question of whether plaintiff's injuries were the result of the shock received by him at the time of the accident.

As said in Wood v. Metropolitan Street Ry. Co., 181 Mo. 433, 449, 81 S. W. 152, 156: "There can be no doubt that it is not allowable to permit an expert witness to give his opinion upon matters upon which men of common information are capable of forming a judgment. Many of the cases cited by appellant are clearly of this character and do not reach the point now under consideration. As said by MacFarlane, J., in Benjamin v. Metropolitan Street Ry. Co., 133 Mo. 288, 34 S. W. 593: 'An exception is made to the general rule [forbidding witnesses to give their opinions], and persons who, by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for the purpose of aiding the jury, permitted to give their opinions.'"

We have so recently examined this question and expressed our opinion, in Wood v. Metropolitan Street Ry. Co., 181 Mo. 453, 81 S. W. 156, 157, that an expert medical man, such as Dr. Hannawalt [15] was shown to be, was competent to give his opinion upon a hypothetical question that an injury was the cause of a disease or condition found in an injured person, that we must decline to do more than refer to that decision for an expression of our views on this point. On a retrial the circuit court can require the hypothetical question to be so framed as to submit those facts of which there was evidence and to require the witness to give his opinion upon the facts thus stated, and assuming that they were true, leaving it to the jury, of course, to find the truth or falsity of the assumption.

For the error in the admission of the statement of the conductor over the objection of defendant, the judgment must be and is reversed, and the cause remanded for a new trial.

Fox, J., concurs.

Burgess, J., absent.

A Presumption of Negligence may arise against a railway company from the occurrence of an accident resulting in injury to a passenger (see the notes to Philadelphia etc. R. R. Co. v. Anderson, 20 Am. St. Rep. 490-495; Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 536; Lincoln St. Ry. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736), as where a passenger on a street railway is injured by a sudden jerk of the car: Dougherty v. Missouri R. R. Co., 81 Mo. 325, 51 Am. Rep. 239.

The Question of Res Gestae is discussed in the monographic note to People v. Vernon, 95 Am. Dec. 51-76. No fixed time or distance from the main occurrence can be established as a rule to determine what shall be a part of the res gestae: Keefer v. Pacific Mut. Life Ins. Co., 201 Pa. St. 448, 88 Am. St. Rep. 822. In fact, time is not necessarily a controlling element or principle in the matter: Coffin v. Bradbury, 3 Idaho, 770, 95 Am. St. Rep. 37; Honeycutt v. State, 42 Tex. Cr. Rep. 129, 96 Am. St. Rep. 797; State v. Foley, 113 La. 52, 104 Am. St. Rep. 493. Generally speaking, however, declarations, to be admissible as part of the res gestae, must be substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations: State v. McDaniel, 68 S. C. 304, 102 Am. St. Rep. 661; Elder v. State, 69 Ark. 648, 86 Am. St. Rep. 220, and see the cases cited in the cross-reference note thereto. Declarations which amount to a mere narrative in regard to a transaction already passed are usually not admissible; Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208. Yet declarations cannot be excluded simply on the ground that they are in the form of a narrative, and made in answer to a question: Murray v. Boston etc. R. R., 72 N. H. 32, 101 Am. St. Rep. 660. Declarations of an agent made after the happening of an event, and not in the course of his agency, are not part of the res gestae: Garrick v. Florida etc. R. R. Co., 53 S. C. 448, 69 Am. St. Rep. 874; Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208; Gilberson v. Patterson Mills Co., 174 Pa. St. 369, 52 Am. St. Rep. 823. But see Paxton v. State, 59 Neb. 460, 80 Am. St. Rep. 689.

STATE v. EATHERLY.

[185 Mo. 178, 83 S. W. 1081.]

JURY TRIAL—Improper Remarks by Court.—Remarks by the court to the jury after it has entered upon its deliberations, urging it to agree within a certain time, and taken altogether constituting a threat, that unless it does so agree, to punish it by keeping it confined during announced long adjournments of the court, are such an invasion of the province of the jury as to constitute reversible error. (p. 569.)

D. W. Hill, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

180 GANTT, P. J. This is an appeal from a judgment of the circuit court of Butler county. The proceeding is by information duly verified as the statute directs, and charges larceny of a bay mare with blaze face on or about the 13th of May, 1903, the property of G. S. Hunt. Defendant was duly

arraigned and pleaded not guilty. He was convicted on the ninth day of October, 1903, and on the same day filed his motion for new trial. The court having adjourned to December 11, 1903, the said motion was on said day overruled and defendant duly excepted, and on said 11th of December filed his motion in arrest, which was overruled and his exceptions duly saved.

1. The instruction to acquit the defendant asked by defendant and refused by the court was properly denied. As the cause must be reversed for another reason, we do not deem it proper to further comment on the evidence or its weight. We simply hold it was sufficient under proper instructions to take the case to the jury.

2. As to the instructions given by the court, they are not preserved in the record, and hence are not before us for review. Those prayed by defendant and refused by the court, in addition to the demurrer to the evidence, to wit, numbers 4 and 5, are correct declarations of law as applied to the testimony, and should have been given if they had not already been given, in substance, by the court in its other instructions, but in the absence of those instructions we cannot determine whether they were erroneously refused. If they were covered by other instructions given by the court, no error resulted from their refusal. If they were not substantially included in the instructions given by the court, it was error to deny them. It must also be said of the objection urged to the state's instructions, that [181] they fail to require the jury to find that the mare was taken "without the consent of the owner," we cannot determine this point because the instructions are not in the record.

3. After the jury had heard the evidence, instructions and argument of counsel and had retired in charge of the sheriff and had been deliberating three hours, the bill of exceptions recites, the court directed the sheriff to bring the jury into open court and thereupon the following proceeding occurred: "Gentlemen, have you agreed upon a verdict?" Having been answered in the negative by the jury, the court then said to the jury: "Gentlemen, you must agree; the court can't try these cases twice." And the court then said to the sheriff in the presence of the jury: "Take the jury in charge, give them their meals, and prepare them a room"; then addressing the jury, further said: "If you can agree by to-morrow morning at 8 o'clock, I will come and receive your verdict; if you don't agree by that time, when you do agree, you will place your ver-

dict with the instructions in an envelope and seal it up and hand it to the sheriff; court will be open Monday and Tuesday, and another day next week, and it will then adjourn until November 1st, when I will not be here, and it will then adjourn until December 1st, when I will be here"; and then the court repeated to the jury: "If you agree by to-morrow morning by 8 o'clock, I will come and receive your verdict, and, if you have not agreed by that time, you will, when you do agree, place your verdict with the instructions in an envelope and seal it up and deliver it to the sheriff"; to all of which remarks by the court the defendant at the time objected and excepted and still objects and excepts.

The attorney general commendably concedes that this action of the court was an invasion of the province of the jury, and error. It is perfectly obvious that [182] taken altogether it was a threat to punish the jury by keeping them confined during the announced adjournments of the court. The very purpose of a jury trial is to get the free and deliberate judgment of the jury uninfluenced by the court further than the proper directions as to the law of the case. Without further comment, it suffices to say the remarks of the court to the jury are such as received the disapproval of this court in State v. Hill, 91 Mo. 423, 4 S. W. 121; State v. Nelson, 181 Mo. 340, 103 Am. St. Rep. 602, 80 S. W. 947; McPeak v. Missouri Pac. Ry. Co., 128 Mo. 617, 30 S. W. 170; Edens v. Railroad, 72 Mo. 212.

For the errors mentioned the judgment is reversed and cause remanded for a new trial.

All concur, except Burgess, J., absent.

URGING OR COERCING VERDICT.

I. Right of Court to Order Further Deliberation and Urge Jury to Agree, 569.
a. Impressing Jury with Importance of Case and Expense of Retrial, 571.
b. Urging Juror to Yield and Agree with Majority, 571.
II. Telling Jurors They Must Agree, 574.
III. Reflection on Honesty or Integrity of Jurymen, 575.
IV. Threat of Keeping Jury for Extended Time, 576.
a. Threat of Personal Inconvenience to Jurors, 579.

I. Right of Court to Order Further Deliberation and Urge Jury to Agree.

The court may properly keep the jury together as long as in his judgment there is any reasonable prospect of its being able to agree. After the jury has deliberated, either for a short or a long time, the court may call the attention of the jury to the propriety of rec-

onciling all differences of opinion so far as it conscientiously can, and agreeing upon a verdict, and may send it back to the juryroom for further deliberation and consideration of the case.

Beyond this the court is not at liberty to go and say anything to the prejudice of either party. An attempt to influence the jury by referring to the time it is to be kept together or the inconvenience to which it is to be subjected, in case it shall be so pertinacious as to adhere to individual opinion, and thus continue to disagree, cannot be justified. It is well settled that a judge has no right to threaten or intimidate a jury in order to affect its deliberations. He has no right even to allude to his own purposes, as to the length of time the jury is to be kept together. There must be nothing, in his intercourse with the jury having the least appearance of duress or coercion. But when the jury returns into court and informs it that it is unable to agree, it is within the province of the judge, and not error for him, to impress upon the jury the importance of an agreement, and to urge the jurors to listen to argument, and sacrifice the pride of opinion, and send them back for further deliberation, when it does not appear that the jury was coerced into a verdict by the prolonged session, or that any physical suffering was inflicted thereby: Phoenix Ins. Co. v. Moog, 81 Ala. 335-343, 1 South. 108; Johnson v. State, 60 Ark. 45, 28 S. W. 792; State v. Olds, 106 Iowa, 110, 76 N. W. 644; Delmonico Hotel Co. v. Smith, 112 Iowa, 659, 84 N. W. 906; Moore v. Cass, 10 Kan. 288; State v. Garrett, 57 Kan. 132, 45 Pac. 93; Parker v. Georgia Pac. Ry. Co., 83 Ga. 539, 10 S. E. 233; Austin v. Appling, 88 Ga. 54, 13 S. E. 955; Brown v. Walker, 32 Ill. App. 199; State v. Dudoussat, 47 La. Ann. 977, 17 South. 685; Emery v. Estes, 31 Me. 155; Watson v. Minneapolis Street Ry. Co., 53 Minn. 551, 55 N. W. 742; Green v. Telfair, 11 How. Pr. 260; Grese v. Shultz, 69 Wis. 521, 34 N. W. 913. After the jurors have failed to agree the court may properly tell them that they ought not to stand out obstinately, but should reason together, harmonize all differences, if possible, and arrive at some kind of a verdict, and that if they want no enlightenment upon the law of the case, they may return to the juryroom and continue to deliberate upon the issues until a verdict is reached: Odette v. State, 90 Wis. 258, 62 N. W. 1054. Upon the disagreement of the jury the court may again order it to its room and tell the jurors to further try to reconcile their differences and agree upon a verdict; that he does not wish to coerce them, but that it is in the interest of society that they shall, if they can, agree upon a verdict: Dow v. State, 31 Tex. Cr. Rep. 278, 20 S. W. 583.

Upon the report of the jury of inability to agree, the trial court cannot be too careful of unduly influencing the mind of the jury, but within proper bounds, and especially in cases where, from the character of the issue and the evidence, there can be little tolera-

tion of obvious unreasonable obstruction to an agreement, the court may properly urge upon the jury the propriety and importance of reaching a conclusion, and may send it back for further deliberation: Fairgrieve v. City of Moberly, 29 Mo. App. 141. The court, may properly say to the jury that, "This jury is, in the eye of the law, as capable of deciding this case and reaching a verdict as any that may be impaneled hereafter, and I am disposed to give you some further opportunity to consider your verdict. Go to your room and make an honest effort to agree on a verdict, and follow the rule I have given you, and I do not think it will trouble you in agreeing": Parker v. Georgia Pac. Ry. Co., 83 Ga. 539-549, 10 S. E. 233. The judge may tell the jurors that the case has been submitted to them for decision and not for disagreement, and that he will give them a further trial: German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 400, 70 N. W. 769. Or he may tell them that some twelve men must settle the matter, that a verdict should be rendered if it can be done without violating their conscience, and under their oath: Frady v. State, 8 Baxt. 349.

a. **Impressing Jury with Importance of Case and Expense of Retrial.**—In this connection, it is proper to state that the rule is well settled that it is within the province of the court and not error, upon the failure of the jury to agree, for the judge to impress upon it the importance of the case, the necessity for a verdict, and the expense of a retrial, and then send it back for further deliberation. The court may, in such case, remind the jury of the disastrous effects to litigants and to the public of failures, on the part of jurors, to agree upon verdicts at the end of protracted litigation, and that the efforts of the court will be employed to secure a verdict, if possible: People v. Miles, 143 Cal. 636, 77 Pac. 666; Strepey v. Stark, 7 Colo. 614-625, 5 Pac. 111; Holland v. People, 30 Colo. 94, 69 Pac. 519; Allen v. Woodson, 50 Ga. 53; Niles v. Sprague, 13 Iowa, 198; Kelly v. Emery, 75 Mich. 147, 42 N. W. 795; State v. Fisher, 23 Mont. 540, 59 Pac. 919; State v. Gorham, 67 Vt. 365, 31 Atl. 845; Hannon v. State, 70 Wis. 448, 36 N. W. 1. Upon the jury stating to the court its inability to agree upon a verdict, the court may admonish it upon its duty as to reconciling divergent views and arriving at a verdict if consistent with a clear conscience, rather than that the parties or the public should be put to the trouble and expense of a retrial of the case. If nothing is said to prejudice the verdict, such remarks are not erroneous: Pierce v. Rehfuss, 35 Mich. 53.

b. **Urging Juror to Yield and Agree with Majority.**—The rule is well established that the authority of the trial judge does not extend to the coercion of a single juror in order to make him yield to the majority in case of a disagreement upon a verdict, but there seems to be some conflict of decision as to what remarks of the

court, directed to one or more disagreeing jurors, will amount to coercion of a verdict. In some cases the remarks of the court are so indiscreet as to leave no ground of doubt as to their coercive force and harmful influence. Thus, where the jury reports an inability to agree, and states that it stands "eleven to one, and that one refuses to say anything," it is clearly error for the court to reply, "Gentlemen, you will further retire and consider this case, and I will say if there is a mistrial in this case, I shall inquire into it, and if I find that any juror has stubbornly refused to do his duty or willfully tried to bring about a disagreement so as to interfere with the administration of justice, I will send him to jail for contempt of court": Lively v. Sexton, 35 Ill. App. 419. If, upon being informed that the jury in a civil case stands eight to three, the judge calls attention to the fact that, if the jury could not agree, all the expenses would fall upon the plaintiff, who was not well off, and informed them that the plaintiff required nine men, and that if it was possible for one of the three to arrive at a conclusion, anything that the judge could do he would cheerfully do, stating that he would send them out once more, and give them a chance to agree, expressing the opinion that, when the jury appreciated the circumstances and situation of the parties, they would make one more effort to do it, after which the jury returned a heavy verdict for the plaintiff in a few minutes, a new trial must be granted, on the ground that the remarks of the court coerced the verdict: Mahoney v. San Francisco etc. Ry. Co., 110 Cal. 471, 42 Pac. 968. It is also error if the court, upon being informed of the disagreement of the jury, says to it, "You must get together; no juror ought to remain entirely firm in his own conviction one way or the other until he has made up his mind, beyond all question, that he is necessarily right and the others necessarily wrong": Cranston v. New York Cent. etc. Ry. Co., 103 N. Y. 614, 9 N. E. 500. If the jury reports that it stands eleven to one, and divided on two hundred dollars, it is error for the judge to tell the jury that it would be better for one or both sides to yield, and that a disagreement over so small a matter would be unfortunate: Goodsell v. Seeley, 46 Mich. 623, 41 Am. Rep. 183. To the same effect, Georgia R. R. v. Cole, 77 Ga. 77; Edens v. Hannibal etc. R. R. Co., 72 Mo. 212. And it is error to tell a disagreeing jury, "If you can't get exactly what you want, get the next best thing to it," because such language coming from the court might cause an individual juror to yield his convictions of right, and agree with his fellows for the sake of agreeing, whether his judgment was convinced and his conscience satisfied or not: Southern Ins. Co. v. White, 58 Ark. 277 24 S. W. 425. If the jury fails to agree and states that "There's eleven of us that could get together in about a minute," and the court then reminds the jury of the trouble and expense of trying the case, and adds that "Verdicts are often reached in cases after further consideration. I don't want to put

you gentlemen to any discomfort unnecessarily, yet I think you ought to look it over, and experience shows that it often takes some little time to get their minds together. I trust and presume that every juror is acting rationally, and that nobody is acting from a dogmatic spirit merely for the purpose of asserting his opinion.'' Such remarks constitute reversible error as coercing a verdict returned shortly after they were made: McPeak v. Missouri Pac. Ry. Co., 128 Mo. 617, 30 S. W. 170. On the same ground it is error for the court to remark to the disagreeing jury that, ''I certainly hope that there are no stubborn men on this jury. There ought not to be. It is the only case for a jury to be tried at this term, and in my judgment there should not be a failure of this character. If I were a juror, and quite a large proportion of my fellows were against me, and I was standing out, and I thought that they were honest and fair, the first thing I would do would be to get before a large looking-glass and look at myself and see if I could not find out what was the matter with me'': Twiss v. Lehigh Valley R. R. Co., 61 App. Div. 286, 70 N. Y. Supp. 241. And to the same effect where the court remarked to the jury, ''I feel as though it was a travesty upon justice that if ten men in a case of this kind are one way and two the other, that there must be something wrong somewhere in the intelligence, or in the conscientious action of some juryman I feel, gentlemen, that it is an outrage upon decency to keep a jury out in this case when you know and realize where the truth is—keeping men out over night in this case'': Hagen v. New York Cent. etc. R. R. Co., 79 App. Div. 519, 80 N. Y. Supp. 580. If, after a jury has disagreed, the court asks each juryman to try as hard as he can to be persuaded, instead of trying to persuade the others, and to try and persuade themselves, and for those who did not agree with the others to see if, by looking over the testimony carefully and listening to the arguments of those not agreeing with them, they could not come to the same verdict. Such remarks must be held error, since they have a tendency to make the jurors feel that they must yield their convictions by agreeing with the majority: People v. Engle, 118 Mich. 287, 76 N. W. 502.

Where the court said to the jurors that it was their duty to agree, if they conscientiously could; that they should pay proper respect to the opinions of each other; that the single object to be effected was to arrive at a true verdict, which could only be done by future deliberation and mutual concession; that no juror should violate his conscience, but in determining whether his convictions were sustained, he should consider the opinions of the other jurors, and if he could then conscientiously acquiesce in a verdict, it was his duty to do so—such remarks were held erroneous as probably coercing the verdict returned: State v. Ivanhoe, 35 Or. 150, 57 Pac. 317. In Gibson v. Minneapolis etc. Ry. Co., 55 Minn. 177, 43 Am. St. Rep. 482, 56 N. W. 686, it was held, contrary, we think, to the general rule,

that it was not error for the court to urge a disagreeing jury to agree by remarking to it that if one or two of the jurors differ in their views of the evidence from the others, they should thereby be induced, although not required, to surrender conscientious convictions, and to doubt the correctness of their own judgments, and that this disparity of opinion should lead them to inquire whether they were not mistaken. To the same effect, however, are the cases of Ahearn v. Mann, 60 N. H. 472, and Whitman v. Morey, 63 N. H. 448, 2 Atl. 899, where it was held not error for the court to say to the jury that "the fact that a juror finds his judgment opposed to the judgment of a majority of the panel, ought to induce him, as a reasonable man, so far to doubt the correctness of his own views as to weigh carefully the opinions of his associates and the arguments and reasons on which they are founded, and if upon due consideration he is convinced that they are probably right and he is in error, it is his duty to agree with them."

It is not error for the court to remark to a disagreeing jury that it is more probable that the recollection of the majority of the jury is correct than that of the minority is right: State v. Blackwell, 9 Ala. 79. Nor is it reversible error for the court to direct a juror to agree with his fellows, when the evidence is of such character that the court may take the case from the jury and direct a verdict: Grimes Dry Goods Co. v. Malcolm, 58 Fed. 670, 7 C. C. A. 426.

II. Telling Jurors They Must Agree.

It is everywhere conceded that if the court remarks to the jury upon its disagreement, either directly or inferentially, that it must agree and decide the case, the judge thus admonishing the jury is guilty of coercing the verdict rendered, and it must for that reason be set aside. Thus if the jury announces that it is impossible for it to agree and the court remarks to it that the case has become an incubus upon the business of the court; that the jury "must decide it," and that "it is no credit to a man merely because he has an opinion to stubbornly stick to it," the verdict afterward rendered must be set aside: Randolph v. Lumpkin, 90 Ky. 551, 14 S. W. 538, 10 L. R. A. 87. If the judge states to the jury that he must have a verdict in the case; that it is peculiar, and that he has reason to believe that some of the jury have been tampered with previous to the trial—such remarks have a tendency to coerce the jury into a verdict from improper motives, and are sufficient grounds for remanding the case for a new trial: State v. Ladd, 10 La. Ann. 271. The same result was reached in Slater v. Mead, 53 How. Pr. 57, where it appeared that the judge remarked to the jury, "You must agree upon a verdict. I cannot discharge you until you agree upon a verdict." In Brooks v. Barth, 98 Mo. App. 89, 71 S. W. 1098, the court admonished the jury that he did not want any of them to violate his conscience in agreeing upon a

verdict; and stated that they had failed to agree in another case; that he had no use for juries that did not agree, and that at times men mistake stubbornness for firmness, and it was held that such remarks were prejudicial and coercive. And to the same effect is State v. Chambers (Idaho), 75 Pac. 274. It is reversible error for the judge to remark to a disagreeing jury that, "Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter. You must find a verdict. Feeling as I do about the case, I do not feel that I should discharge you": State v. Fisher, 23 Mont. 540, 59 Pac. 919.

Contrary to the doctrine of these cases is that of Carlisle v. State (Tex. Cr. Rep.), 56 S. W. 365, wherein it was held that remarks by the judge in the presence of the jury, after it had failed to agree, that he was going to put a stop to hung juries, and force them to agree, were not erroneous, as they did not indicate to the jury how the court desired it to decide the case under consideration.

III. Reflection on Honesty or Integrity of Jurymen.

"A court may properly call the attention of the jury to matters which increase the desirability of an agreement, such as the time already taken, the improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, and at least in cases where the matters at stake are of minor importance, the question of expense to the parties and the public, yet no juror should be influenced to a verdict by a fear of personal disgrace or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal considerations should never be permitted to influence his conclusions and the thought of them should never be presented to him as a motive for action": State v. Bybee, 17 Kan. 466. Hence when the duty of agreement is urged upon the jury by the court, who intimates that it would be a reflection on the intelligence or honesty of its members not to agree, and that they should bring their minds together as an apothecary mixes different ingredients and ascertains the product, and where the tendency of the remarks is to impress too strongly upon the jury the duty and necessity of coming to some agreement, the general rule is that the verdict rendered under such circumstances will not be permitted to stand on the ground that it was brought about through undue influence on the part of the court: State v. Bybee, 17 Kan. 462. After a jury has reported to the court that it stands ten to two, it is error for the court to say to the jurors that if they do not agree it is not improbable that the public will suspect some of them of corruption, and to intimate that a disagreement might be due to self-will or stubbornness, a proper remedy for which offense would be the disgrace of exclusion from the jury-wheel and the posting of their

unfitness in a public office, and finally that he could not think of discharging them, even if they had to remain for weeks in the jury-room: Miller v. Miller, 187 Pa. St. 572, 41 Atl. 277. In another case, however, where the court admonished the jury "that if any juror went into that jury-box with the predetermination as to how he would find his verdict and to hang the jury or to cause a disagreement, if the verdict could not be rendered as he wanted it, he would have a happy time of it," but that the court did not wish "to interfere with the opinion or action of any juror who acts conscientiously and in accordance with his best judgment," it was held that these remarks did not constitute such an undue interference with the prerogatives of the jury as to vitiate their verdict: State v. Laurence, 38 Iowa, 51. In this case the court said: "We recognize in its fullest extent the doctrine that a jury in an honest and conscientious endeavor to determine the facts in a case, should be free from dictation and interference of the court. And whenever it is rendered reasonably apparent that the province of the jury has been so far invaded as to prevent a free and honest investigation of the case, we would not hesitate to interfere": State v. Laurence, 38 Iowa, 51.

IV. Threat of Keeping Jury for Extended Time.

The time which jurors shall be kept together before they are finally discharged because of their inability to agree on a verdict, rests largely in the discretion of the trial court, but this is a legal discretion, and if legal rules and principles governing it are transgressed, the action cannot be upheld: Jahnke v. State (Neb.), 94 N. W. 158. The jury should not only be kept from all extraneous influences in reaching a verdict, but the court itself should be careful not to trench upon the province of the jurors. They should not be coerced by threat or otherwise into finding a verdict, for a verdict resulting from coercion cannot be allowed to stand. A reasonable time, to be determined by the circumstances of the case, should be allowed the jury for the performance of its duty, and it should be kept together until the trial court is satisfied that it has made an honest effort to agree, and cannot do so from a conscientious difference of judgment. Great latitude is allowed the trial court as to the length of time a jury may be kept together, and, unless it is a clear case of an abuse of discretion, the verdict will not be disturbed on the ground of coercion arising from remarks made by the court. But it is the safer and better practice for the court to refrain from any expression of opinion, which may be claimed to savor of threat or coercion, as to the time the jury will be kept together if a verdict is not sooner reached and rendered: Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830. An attempt to influence the jury on the part of the court by referring to the time it is to be kept together or the inconvenience to which each member is to

be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations: Green v. Telfair, 11 How Pr. 260. Hence remarks of a trial judge that he will keep the jury together until the end of the term of court unless a verdict is sooner rendered is reversible error: Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 South. 108; North Dallas Circuit Ry. Co. v. McCue (Tex. Civ. App.), 35 S. W. 1080. And telling the jury that it will be held about two months unless a verdict is sooner rendered is improper: Burgess v. Singer Mfg. Co. (Tex. Civ. App.), 30 S. W. 1110. If a trial judge remarks to the members of the jury that "they ought to agree and decide cases, for they had to be decided by juries"; and that "he had no idea of discharging them, but would keep them together on the case during the entire term, if it lasted three weeks, unless they sooner agreed upon it," is reversible error: Chesapeake etc. R. R. Co. v. Barlow, 86 Tenn. 537, 8 S. W. 147. To tell the members of the jury that unless they sooner agree they will be kept together four days longer, is such a threat on the part of the court as constitutes an improper effort to coerce an agreement: Terre Haute etc. R. R. Co. v. Jackson, 81 Ind. 19. A trial judge has no right to threaten or intimidate jurors who are unable to agree upon a verdict, by telling them how long they may expect to be held unless they sooner render a verdict. The members of the jury must be left to feel that they act with entire freedom in their deliberations, and there should be made to them no threat or coercive intimidation that should they continue to disagree they will be subject to unreasonable inconvenience or kept together for an unreasonable length of time: De Jarnette v. Cox, 128 Ala. 518, 29 South. 618. The court may very properly tell the members of the jury that if they agree upon a verdict within a reasonable time, the court will receive it: Williams v. State (Neb.), 95 N. W. 1014. Or he may properly say to them, "Well, I do not wish to force you to make a verdict, but I will stay with you the day. Retire to your room and see if you cannot agree upon a verdict": Jones v. State, 117 Ga. 710, 44 S. E. 877. Unless the court intimates some particular time within which he desires the jury to return their verdict, and uses language which may be construed to contain a threat or constitute coercion to compel the rendering of a verdict within such time, he has great latitude in the manner of directing the jury to continue its deliberations. Thus, the court may, without committing error, inquire of the members of the jury whether it is probable that they will agree upon a verdict within an hour, and, on being answered in the negative, inform them that the court will be in session for a week, and that they will have ample time in which to arrive at a verdict: Brady v. State (Tex. Cr. Rep.), 74 S. W. 771. Or upon the jury reporting a failure to agree, the judge may inform

them that there are two more weeks of the term and that he will give them plenty of time to consider, and then direct that they be provided with comfortable accommodations: Osborne v. Weeks, 108 N. C. 651, 13 S. E. 285. In Knapp v. Chicago etc. Ry. Co., 144 Mich. 199, 72 N. W. 200, the court informed the jury that if its members "agreed before the incoming of the court in the morning," they would be discharged by the sheriff, and if they did not agree, they were to stay until they did agree, and it was held that such remarks simply meant that they were to be kept together until the next morning unless they agreed before, and not that they were to be kept indefinitely unless they agreed, and hence that such remarks were not reversible error. It has also been held that if the court tells the members of the jury that if they agree upon a verdict before the usual hour of adjournment, to come into court and deliver it, but that if they agree upon it after that hour they need not come into court to deliver it the next day, as the court will not be in session for that purpose, and that the next day after that is a legal holiday, and the jury three hours later agree upon a verdict, seal it up and separate, returning and rendering the verdict after such holiday is passed, the verdict must stand, as there is nothing in the remarks of the court to indicate any semblance of coercion: Darlington v. Allegheny City, 189 Pa. St. 202, 42 Atl. 112. A directly opposite conclusion was reached in McCormack v. Cox, 8 Colo. App. 17, 44 Pac. 768, where the court said that "such proceeding was irregular. No legal verdict could be coerced from a jury, in effect subjecting the jury in advance to over two days' confinement if they failed to agree." A statement by the court to the jury that if it did not reach an agreement within an hour, it might separate and come together the next morning and further consider a verdict, is not error, or an effort to coerce a verdict: Madison Coal Co. v. Beam, 63 Ill. App. 178. If the court asks the jury to agree that evening if it can, and if so to inform him and he will receive the verdict at any time before bedtime and discharge the jury, or they could return to the hotel and he would allow them pay for the next day, and they thereafter agree upon a verdict and the judge reconvenes court, receives the verdict and discharges the jury, he is not guilty of error, or an attempt to intimidate the jury: Wilson v. State, 109 Tenn. 167, 70 S. W. 57. If the court remarks to the jury before adjournment on Saturday that "if the court is adjourned before you agree you will write your verdict," seal it, "and return here Monday morning," a sealed verdict returned into court Monday morning is not void, as obtained through coercion or restraint of the jury: Stevenson v. Detroit etc. Ry. Co., 118 Mich. 651, 77 N. W. 247.

A statement by the court to the jury that if a verdict was rendered by a certain time it would be discharged, otherwise it would be held until an agreement was reached, is improper, as inducing

a verdict by the time named, and hence ground for setting the verdict aside: State v. Hill, 91 Mo. 423, 4 S. W. 121. Again, if the court states to the jury, "I will have to go away on an evening train. If you cannot agree, I will leave some one to receive your verdict and you can stay until morning, if you do not agree before," and afterward sends the sheriff to the jury saying, "Tell the jury it is time for me to go and for them to report the prospect of a verdict," and the jury thereupon returns a verdict in a few moments, it must be set aside as induced by coercion on the part of the court: McCombs v. Foster, 64 Mo. App. 613. If the court informs the jury shortly before adjournment on Saturday that they must remain together until they have agreed, and if they do not agree by a certain hour that evening they must remain in the jury-room, as the court would adjourn until Monday, and shortly after such remarks are made the jury return a verdict, it must be set aside, as induced by coercion: Vicksburg Bank v. Moss, 63 Miss. 74; Maury v. State, 68 Miss. 605, 24 Am. St. Rep. 291, 9 South, 445.

a. **Threat of Personal Inconvenience to Jurors.**—It is reversible error for the court to call a jury which is deliberating on a case, and inform it that if a verdict is not agreed upon the members of the jury will be kept in confinement for several days and receive but one meal per day: Fairbanks v. Weeber, 15 Colo. App. 268, 62 Pac. 368. In this case the court said: "We know, however, of no power possessed by the court to even by implication coerce or compel a verdict. It undoubtedly has the right when circumstances warrant it to retain the jury for what may seem to be an unreasonable time, in the hope of compelling an agreement; it has no right, however, to coerce the jury by the suggestion that they shall be confined a specific time if they fail to agree and whatever may be its right with regard to feeding the jury or entertaining them, it has no right to force a verdict by telling them that they shall be kept to a fixed date and have only one meal a day unless they agree. Whenever the court has adopted such a course we may not assume that the verdict is a fair and honest result of the deliberation of the jury, but must conclude as a matter of fact that it was a coerced verdict, which must not stand": Fairbanks v. Weeber, 15 Colo. App. 273, 62 Pac. 370.

For the court to tell the jury that unless they agreed upon a verdict by a certain time they would have to be kept together during the entire following day and night; that the sheriff would provide a place for them to sleep together, but that their meals would be furnished to them at their own expense, is reversible error, as an attempt to coerce a verdict: Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327.

If the jury announces an inability to agree upon a verdict, and the court then orders the jury to be locked up until it does agree, without allowing the members their meals, a verdict which is the

result of such a mandate of the court cannot be allowed to stand, as the jury might well understand from such order that it is required either to agree upon a verdict or submit to indefinite confinement and starvation: Hancock v. Elam, 3 Baxt. 33. The court has no right to carry a jury into a different county from that in which it is impaneled, in order to force an agreement upon a verdict, and any threat to do so in case a verdict is not found within a certain time is coercion, which vitiates the verdict thereafter rendered: Spearman v. Wilson, 44 Ga. 473.

GERST v. CITY OF ST. LOUIS.

[185 Mo. 191, 84 S. W. 34.]

LATERAL SUPPORT — Excavations — Negligence — Notice — Parties Liable.—It is the duty of one who makes an excavation on his own land, deeper than the foundation of a building on an adjoining lot, and so near to such building as to endanger it, to notify the adjoining owner of the proposed excavation, and afford him a reasonable opportunity to protect his property. A failure to discharge such duty is negligence for which an action may be maintained for the resulting injury, unless the adjoining owner had actual knowledge of such proposed excavation. This rule applies to municipalities and their contractors as well as to other persons. (pp. 589, 590.)

LATERAL SUPPORT—Excavations—Notice.—Publication in a newspaper of an ordinance creating a sewer district and providing for the construction of sewers, and the registering of the contract therefor, are not notice to an adjoining property owner that the city intends and is about to make excavations so near his property as to remove his lateral support. (p. 590.)

DAMAGES.—Interest is not recoverable on damages in actions ex delicto, where no pecuniary benefit can accrue by reason of the injury. (p. 591.)

LATERAL SUPPORT—Excavations—Damages—Interest.—An adjoining owner who is entitled to damages from a city and a contractor for injury to his property caused by an excavation made without notice, and which removes his lateral support, is not entitled to interest on the damages awarded him, "from the date of the injury to the date of the trial." (p. 591.)

C. W. Bates, B. H. Charles and H. P. Rogers, for the appellant.

A. and J. F. Lee and G. R. Lockwood, for the respondent.

197 BRACE, P. J. This is an appeal from a judgment of the St. Louis city circuit court in favor of the plaintiff, Catherine T. Gerst, for the sum of seventeen hundred and thirty-eight dollars and [illegible]ty-eight cents [illegible]nst the defend-

ants, the city of St. Louis and the Heman Construction Company.

The plaintiff is the owner of a lot in said city on which are two houses, known as Nos. 3015 and 3017 Newstead avenue, fronting thirty-three feet on the west line of said avenue, the north wall of said buildings extending back therefrom along the south line of an alley, which the petition alleges is about nine feet six inches wide, and for cause of action the plaintiff in her petition alleges "that on or about the tenth day of March, A. D. 1898, the defendants, the Heman Construction Company, and the city of St. Louis, dug an excavation for a sewer in said alley, and along the southern line thereof, and did said work so carelessly and negligently as to cause the sinking, breaking, crumbling [198] and shattering of two new houses on said land, known as Nos. 3015 and 3017 Newstead avenue, and the improvements connected therewith, and the almost total destruction of the northern one of said houses, namely 3017 Newstead avenue; that said houses and improvements were the property of this plaintiff; that defendants were negligent in the plan, method and manner of doing said work in this, to wit, that the said excavation was made just along the side of the northern wall of the building in which said two houses were embraced, and was sunk to a depth so far below the cellar and foundation of said building as to endanger the stability of said building and make it part and break and sink and be shattered, as the defendants well knew, or by the exercise of reasonable care would have known, was likely to occur as the result of said plan, method and manner of doing said work; that the said defendants were further negligent in the conduct of said work in this, to wit, that they failed to properly support, or cause to be properly supported by props or timbers or stone pillars, or otherwise, the said northern wall of the said building, and failed to notify the said plaintiff of the commencement or progress of the work, or that she should herself support the said wall and building from the danger of falling or being otherwise injured, which the said defendants knew, or by the exercise of ordinary care would have known threatened said building from the work in which they were engaged.

"Plaintiff states that neither she, nor any agent or attorney of hers, had any notice, or knew, or had any reason to believe at any time before the sinking and breaking of said wall, or before said excavation was completed, that said defendants were making, or intended to make, said excavation, or any excava-

tion. Plaintiff states that by reason of the sinking, breaking, crumbling and shattering of said building as aforesaid, she was put to great expense in repairing the same, to wit, the sum of fifteen hundred dollars; that even after [199] said repairs had been made to said building at the cost aforesaid, the said building was still deteriorated by reason of said breaking, sinking, crumbling and shattering caused by defendants as aforesaid from the condition in which it was prior to said action of said defendants to the extent of five hundred dollars; that the said houses at the time said defendants caused them to be sunken, broken, crumbled and shattered as aforesaid were all occupied by tenants producing rent to this plaintiff, and that the rental value of said houses was twenty dollars per month for each house; that the conduct of said defendants as aforesaid in sinking, breaking, crumbling and shattering said houses caused the northern one of said houses, No. 3017 Newstead avenue, to be in a state unfit for occupancy from the seventeenth day of March, 1898, to the twenty-first day of September, 1898, whereby this plaintiff was deprived of rent from said houses for said period of time, and to an extent amounting to one hundred and twenty dollars.

"By reason of the premises plaintiff has suffered damage in the total sum of two thousand one hundred and twenty dollars, for which sum, with interest and costs, said plaintiff asks judgment."

It appears from the evidence that plaintiff's premises are situate in a sewer district duly established by an ordinance of said city, and that the excavation for the sewer in said alley was made by the construction company in pursuance of a contract between the city and said company for constructing sewers in said district, duly executed in pursuance of ordinances duly passed for that purpose—which contract required the construction company to do the work in a substantial and workmanlike manner in conformity with the plans of such work on file in the office of the sewer commissioner of the city, and "in strict obedience to the directions which may from time to time be given by said sewer commissioner or his duly authorized agents." [200] and in accordance with the specifications therein set out.

The case, as further shown by the evidence, is, in the main, fairly presented by the following excerpts from the statement of counsel for the construction company:

"The work of excavating for sewers in said district approached the plaintiff's property from the east, through an alley

across the street from plaintiff's property on Newstead avenue, and almost directly in front of it; the excavation was tunneled under the street-car tracks on Newstead avenue immediately in front of the house that was injured, which house was at the time occupied by plaintiff's tenants, and continuing toward the west side of Newstead avenue, was made under the sidewalk on the west side of Newstead avenue, and at the northeast corner of the house; then an open ditch followed immediately alongside the wall of the house toward the west and rear thereof, when tunneling again was resorted to at a point half way between the front and rear of the house, after which another open ditch, which went into a tunnel at the rear end of the house.

"The blue-print of the plan of the sewer indicated that the alley alongside of plaintiff's wall was nine feet six inches in width, but when the work reached that point the construction company found that said alley or right of way in which the excavation was to be made and the pipe laid was but four feet six inches in width. Before undertaking to excavate alongside of the wall, the city engineer gave directions to lay the sewer in that narrow space to a depth of sixteen or seventeen feet, which was about twelve feet deeper than the stone foundation of the wall, and drove stakes indicating where the excavation was to be made. The pipe to be laid at that point was thirty inches in diameter, inside measurement, and the greatest outside diameter of same was forty-two inches. This necessitated the excavation of the entire right of way with the exception, [201] after making allowances for sheeting on the walls of the excavation and space for the pipe to pass down, of an inch on either side of the ditch. When this became apparent the representative of the construction company remonstrated to the representative of the city who was in charge of the work, that to make the excavation and put in the sewer under such conditions would endanger the safety of the building, and Mr. Wall, as such representative of the city, said that was all the space there was for it and that the excavation would have to be made according to the lines indicated by the stakes; and the Heman Construction Company went on and did the work precisely according to the contract and directions of the representative of the sewer commissioner. The width of the excavation consuming almost the full width of the alley, or right of way, and the plaintiff's house extending two inches to the north of her own lot and over and upon the right of way, it was impossible to avoid laying bare the foundation of the north wall,

though the excavation or opening did not at any point extend across plaintiff's line or to her lot, or under house. Sheeting of timbers two inches thick was laid on each side of the excavation, being against the earth on the north and against the stone foundation of the house on the south, and braced with four inch by four inch and four inch by six inch timbers extending across the ditch and wedged in between the sheeting. There were also braces put in the tunnels mentioned. These openings were not all made at once, but by degrees from east to west, and by making new openings as the pipe was laid and the excavation filled to the rear; and all the timber made use of in sheeting and bracing as aforesaid was left in place undisturbed for the protection of the building, and the earth as it was put back into the opening was carefully rammed. Despite the careful manner in which all this was done, in a short time—plaintiff's witnesses say before the work had passed the house and defendant's witnesses say [202] afterward—the house began to settle and the walls began to crack and the tenants were required to move it. . . . .

"Neither of the defendants actually informed the plaintiff or her agents or tenants, by word of mouth or written notice, of the time and place of the excavation, and plaintiff and her agents disclaimed any actual notice of any kind, so that, if the adoption and publication of the ordinances and the proposals for bids and the filing of the plans for the work in the office of the sewer commissioner, or the actual knowledge of the tenants, gave no notice to plaintiff of the time and place of the excavation, then as far as the record goes she had none.

"The testimony offered by plaintiff shows that her house was well built and in good condition prior to the excavation, though some of the defendant's witnesses say that a small crack was observable in the front wall near a window-sill. After the tenants had moved out, the house remained unoccupied for some time and the plaintiff lost in rent the sum of one hundred and twenty dollars, concerning which amount there is no dispute. The sum expended by plaintiff in repairs to the house was thirteen hundred and eighty-four dollars and eleven cents, which was shown to have been necessarily expended in restoring the house, and reasonable in amount. It was also shown that after the expenditure of this sum of money the house was completely restored, and was a better house than before the injury, from the fact that in restoring the house the foundation of the north wall was extended to a considerable depth and

to the level of the bottom of the sewer pipe. Nevertheless, plaintiff offered testimony tending to show that the salable value of the building had decreased merely from the fact that the building would be prejudiced in the estimation of possible buyers on account of having once been injured and repaired. The testimony was objected to by defendants on the ground that there was no allegation in plaintiff's petition of [203] any such depreciation in value, and on the further ground that that particular element of damage was not, even though it may have existed, proximate damage flowing from any injury to the wall as a result of the defendant's conduct. This objection was overruled, both defendants saving exception, and plaintiff's witnesses testified that the salable value of the building was, in the manner indicated, impaired to the extent of fifteen or twenty per cent of its original cost—that is, in the sum of four hundred or five hundred dollars, because of a doubt thrown upon the property in the mind of the public, which doubt would require explanation.

"Each defendant asked peremptory instructions in the way of demurrer to the evidence at the close of plaintiff's case; all of the instructions asked by the defendants in the case were refused by the court. And as each defendant was required to ask separate instructions covering many different features of the case, the instructions were necessarily voluminous."

It is not necessary to set out these voluminous instructions.

The legal questions to be determined arise upon the refusal of the court to sustain the demurrer to the evidence, and upon the following instructions given by the court:

PLAINTIFF'S INSTRUCTIONS GIVEN.

"1. The court instructs you that if you believe from the evidence that the building of plaintiff, which is described in the petition herein, was caused to be cracked and broken so that it became necessary to reconstruct the same, and that plaintiff did cause the same to be reconstructed, that the reconstruction of said building was made necessary by reason of the careless and negligent manner in which the defendant, the Heman Construction Company, dug the excavation alongside of said building, or became necessary because of the negligence of said defendant, Heman Construction [204] Company, in the plan, method, or manner of making said excavation, and that said Heman Construction Company well knew, or by the exercise of ordinary care could have known, that the said building was

likely to be cracked as a result of the carrying out of said plan, method and manner of making said excavation as carried out by said construction company, and that said company carelessly and negligently failed to properly support or cause to be supported by piers, timbers, stone pillars or otherwise said building, and carelessly and negligently failed to notify plaintiff, or any agent of hers, of the commencement or progress of said work, and that said plaintiff, and no agent of hers, knew or had noticed at any time before the cracking and breaking of said building that said Heman Construction Company, or the city of St. Louis, was making, or intended to make said excavation, or any excavation at or near the plaintiff's said building, then you should find your verdict in favor of the plaintiff and against the defendant, the Heman Construction Company, and assess her damages at such sum as you may find was the injury to her by reason of the injury to her said building, less such a sum, if any, as you may believe from the evidence plaintiff would have been obliged to spend if she had properly protected her said building from the injury by said excavation upon notice to do so by the defendants or either of them. In computing said damages you may further consider the difference in value, if any, between said house when repaired and its value just preceding its injury, and the loss, if any, in rents to the plaintiff between the date of said injury and the time at which said building could have been repaired so as to be again fit for occupancy, if the plaintiff had exercised reasonable diligence in repairing the same upon the injury thereto, but which date shall not be a period later than the date upon which the building was actually repaired, but in no case shall you allow the [205] plaintiff as the cost of repairing said building a greater sum than the amount claimed in the petition therefor, to wit, fifteen hundred dollars, nor for the deterioration of said building more than the amount claimed in the petition therefor, to wit, five hundred dollars, nor for the loss of rents a greater sum than one hundred and twenty dollars.

"2. The court instructs you that if you believe from the evidence that the city of St. Louis gave to the defendant, the Heman Construction Company, any directions or instructions, and controlled and directed said company as to the manner in which said excavation should be made, and the defendant company carried out such instructions and directions as they were given to said company by said city, and that such instructions

or directions were negligently and carelessly given and said control was carelessly and negligently exercised by said city of St. Louis, and that the execution of the same by said company as so given, directly contributed to the injury of plaintiff's said house, and if you further find your verdict against the Heman Construction Company under instruction 1, given you in this cause, then you should find your verdict also against the city of St. Louis for the same amount for which you find it against the Heman Construction Company, under said instruction 1.

"The court instructs you that if you find your verdict for the plaintiff herein, you should also allow the plaintiff on any sum you may find in her favor interest at the rate of six per cent per annum, from the date on which you find said building was injured to this date. except as to any sum you may allow her for loss of rents, and as to any sum so allowed her you should find her interest at the rate of six per cent per annum on each month's rent which you may find in her favor under said instructions from the date such month's rent would have become due up to this date."

Which said instructions. and each of them, the [206] court gave, to which action and ruling of the court, in giving each of said instructions of the plaintiff, the defendant, the city of St. Louis, and defendant, Heman Construction Company, each, then and there excepted at the time.

INSTRUCTION GIVEN BY THE COURT OF ITS OWN MOTION.

"If the jury believe from the evidence that the engineer of the defendant, the city of St. Louis, had in charge the construction of the sewer in question, and if they further believe from the evidence that he prepared the plans and specification for the same, and fixed the location for the construction, under its contract which said city introduced in evidence, or caused the same to be done, and if the said engineer so in charge of the work on behalf of the city knew, or had reason to believe, that the construction thereof on the north line of plaintiff's premises as required by said plans and specifications was likely to injure and damage the north wall of plaintiff's house, then it was the duty of the defendant, the city of St. Louis, before it permitted the Heman Construction Company to begin the excavation of said sewer along the north wall of plaintiff's house, to notify plaintiff of said proposed excavation and of the probable injury which would result therefrom to plaintiff's

house and to request the plaintiff to take the necessary steps to prevent such injury, unless the jury should find from the evidence that the plaintiff or her agent had actual knowledge of said proposed excavation, and if said defendant, the city of St. Louis, failed and neglected to give such notice and make such request, and failed itself to take any steps to prevent such injury before or at the time it permitted the Heman Construction Company to make said excavation and construct such sewer, and if the jury further find and believe from the evidence that the Heman Construction Company had reason to believe that the proposed excavation was likely to occasion injury to the plaintiff's house, and it failed [207] and neglected to give notice of said proposed excavation to the plaintiff before making the same, and to request the plaintiff to take the necessary steps to prevent such injury, unless the jury should find from the evidence that the plaintiff or her agent had actual knowledge of said proposed excavation, and if the jury further find from the evidence that the plaintiff's house was damaged in consequence of the failure to give such notice, and by reason of the failure, if any, on the part of the said defendant, the city of St. Louis, and the said defendant, the Heman Construction Company, to take the necessary and proper steps to prevent such injury, then their verdict should be for the plaintiff and against both of the defendants, namely, the city of St. Louis and the said Heman Construction Company, and for such reasonable sum as the jury may believe from the evidence the plaintiff was necessarily compelled to expend to repair the injury done to said house by said excavation and the failure aforesaid, if the jury find there was such failure, and also for such other sum, if any, as the jury may believe from the evidence the plaintiff has lost in rents in consequence of said injury, and last, for such further sum, if any, as the jury may believe from the evidence will fully compensate plaintiff for the permanent depreciation, if any, in the value of the house of the plaintiff occasioned by such injury, deducting from said amounts so found such amount as the jury may believe from the evidence the plaintiff would have necessarily been compelled to expend in order to prevent injury to said house if she had received timely notice from the defendants, or either of them, of said proposed excavation along the north wall of her house."

Under these instructions the jury returned a verdict for the plaintiff for seventeen hundred and thirty-eight dollars and eighty-eight cents, and from the judgment thereon the defendants appeal.

1. The principal question presented by this record for determination is whether a legal duty is imposed [208] on one who proposes to make an excavation on his own premises which may endanger the building of his neighbor, to give the latter notice of what he proposes to do, so as to enable him to take the necessary measures for the preservation of his property. In the last edition of Judge Thompson's great work on Negligence the law on this subject may be found thus stated: "Whatever may be the right of one land owner to excavate his own soil so as to deprive his neighbor's land of its support, the authorities are agreed that he must exercise what care and skill he can to prevent injury to his neighbor; and if he inflict an unnecessary injury upon his neighbor through negligence, he must pay the damages. Thus, the authorities are agreed that one who proposes to excavate, or to make other alterations or improvements upon his own land which may endanger the land or building of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. . . . . The failure to give such notice is, in theory of the law, such negligence as will render him liable for any damage to the property of the adjoining owner which may be occasioned by the work which he does on his own land, in the absence of knowledge on the part of such adjoining owner otherwise acquired. . . . . Nor does the giving of such notice exonerate him from further duty toward the neighboring land owner. He must still conduct the work of excavating with reasonable care and skill, and is liable to his neighbor for any damages caused by the want of it. On the other hand, having given this notice and having afforded his neighbor a reasonable opportunity to protect his own property, he is not answerable for any injury which may happen to the property of his neighbor, provided he proceeds with the work of excavation on his own land with reasonable care and skill"; 1 Thompson on [209] Negligence, sec. 1109.

The same doctrine is thus more tersely stated by another eminent author in a recent work: "In the exercise of proper care a party excavating near a building on the land of another is required to give notice to the owner of such building of the intended improvement unless such owner has actual knowledge of the work proposed": Jones on Easements, sec. 610.

Other text-writers and many adjudicated cases are cited by these authors in support of the texts, and this doctrine is now well supported by the weight of modern authority.

While it cannot be said that the law has thus been definitely settled in this state by any direct decision, yet the doctrine has often been approvingly recognized by this court (Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; Larson v. Metropolitan Street Ry. Co., 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. 416, 16 L. R. A. 330; Obert v. Dunn, 140 Mo. 476, 41 S. W. 901) and by the court of appeals (Eads v. Gains, 58 Mo. App. 586; Walters v. Hamilton, 75 Mo. App. 237). Founded on the maxim, "Sic utere tuo ut alienum non laedas," its reasonableness must ever commend it to the judicial mind; and in view of what has been said on this subject in the cases cited, the weight of authority elsewhere, and the inherent soundness of the principle, we have no hesitation now in directly holding that it is the duty of one who makes an excavation on his own land, deeper than the foundation of a building on an adjoining lot, and so near to such building as to endanger it, to notify the adjoining owner of the proposed excavation and afford him a reasonable opportunity to protect his property, and a failure to discharge such duty is negligence for which an action may be maintained for the injury resulting therefrom, unless the adjoining owner had actual knowledge of such proposed excavation, and there is no good reason why this rule should not be applied to municipal corporations and their contractors as well as to other persons. The suggestion that the plaintiff had such notice in this case from [210] the fact of the publication in the newspapers of the ordinance creating the sewer district and providing for the construction of sewers therein and the registering of the contract therefor, is wholly untenable. In fact, the impending danger to the plaintiff's building by the proposed excavation did not become apparent even to those in the immediate charge of the work until the line of the sewer was definitely located on the ground by the city engineer immediately alongside the north wall of her building. When it became so apparent to the city engineer and the contractor, it became their duty to notify the plaintiff of the impending danger to her property and afford her an opportunity to protect the same. This duty they failed to discharge. The work proceeded without the knowledge of plaintiff, and as a necessary consequence thereof her building was injured, and for the injury the defendants ought to be held liable. Therefore, the court did not err in overruling the demurrers to the evidence, nor in refusing to instruct that the publication of the ordinances and the registration of the contract imparted notice to plaintiff. The

failure to give notice was the only actionable negligence which the evidence tended to prove, and while the instructions given at the request of the plaintiff, by coupling it with other acts, presented that issue but vaguely, the instruction given by the court on its own motion presented it clearly and distinctly, and as the verdict is responsive thereto, and upon such issue could not have been other than it was, the judgment ought not to be disturbed unless for error in the instructions on the measure of damages.

2. The errors assigned in this regard are that the jury were thereby authorized, in addition to the cost of reconstruction and the loss of rents, to allow the plaintiff such further sum, if any, they may believe from the evidence would fully compensate her for the permanent depreciation in the value of her property, and were further authorized to allow her six per cent [211] per annum interest on such sum as they may find in her favor.

We see no valid objections to the instructions authorizing an allowance for permanent depreciation in the value of plaintiff's property; but whatever may be the rule in other jurisdictions, the settled law in this state is that interest is not recoverable on damages in actions ex delicto where no pecuniary benefit could accrue by reason of the injury: Kenney v. Hannibal etc. R. R. Co., 63 Mo. 99; Marshall v. Schricker, 63 Mo. 308; Atkinson v. Atlantic etc. R. R. Co., 63 Mo. 367; Meyer v. Atlantic etc. R. R. Co., 64 Mo. 542; De Steiger v. Hannibal etc. R. R. Co., 73 Mo. 33.

In this respect the instruction was erroneous. It is contended, however, for respondent that the judgment ought not to be disturbed on account of this error because of the error in plaintiff's instructions authorizing the jury to deduct from the sum they were authorized to find for plaintiff such amount as the jury may believe from the evidence the plaintiff would have necessarily been compelled to expend in order to prevent the injury to her house if she had received timely notice, which amount would have exceeded the interest.

We are of the opinion that there was no error in this qualification of the instruction, but if there was, the plaintiff is in no position to take advantage of it, being an error which the plaintiff herself invited by asking it in her own instruction. And we do not think the judgment ought to be reversed and the cause remanded for the error in regard to interest It can be remedied here. The amount of interest which could have been

allowed under this instruction could not have exceeded three hundred and twenty dollars, and if the plaintiff will enter a remittitur on the judgment of that amount, the same will be affirmed; otherwise, the judgment will be reversed and the cause remanded for new trial; in either event, the costs will be taxed against the respondent.

All concur, except Robinson, J., absent.

The Right to Lateral Support is the subject of an extended note to Larson v. Metropolitan St. Ry. Co., 33 Am. St. Rep. 446-476. That it is negligence to excavate by the side of an adjoining owner's wall without giving him notice, see Davis v. Summerfield, 131 N. C. 352, 92 Am. St. Rep. 781; Schultz v. Byers, 53 N. J. L. 442, 26 Am. St. Rep. 435. As to the right of lateral support as against municipal corporations, see the note to Larson v. Metropolitan St. Ry. Co., 33 Am. St. Rep. 465; Parke v. Seattle, 5 Wash. 11, 34 Am. St. Rep. 839; Stearns v. Richmond, 88 Va. 992, 29 Am. St. Rep. 758; Nichols v. Duluth, 40 Minn. 389, 12 Am. St. Rep. 743.

O'BRIEN v. ST. LOUIS TRANSIT COMPANY.

[185 Mo. 263, 84 S. W. 939.]

STREET RAILWAYS—Passengers—Who are.—A person attempting to alight from a street-car remains a passenger until he has accomplished the act of alighting in safety, and the company as a carrier of passengers owes to the passenger attempting to alight that very high degree of care and attention which the law puts upon it generally to the end of promoting the safety of its passengers. (pp. 594, 595.)

STREET RAILWAYS—Liability to Passengers.—A street-car company is liable absolutely as an insurer for the protection of its passenger against assault or insult at the hands of its own servant, both while such passenger is on its car and while he is attempting to alight. (p. 595.)

STREET RAILWAYS—Assault by Conductor—Duty to Passenger.—If a street-car conductor engages in a quarrel with a passenger as the latter attempts to alight from the car, and strikes him, and then follows him to the sidewalk and kills him, the duty of the carrier to the passenger still continues, and the conductor is not, when he reaches the sidewalk with the passenger, beyond the field in which his act as servant is chargeable to the master. (p. 595.)

STREET RAILWAYS—Assault by Passenger.—If a passenger on a street-car assaults the conductor thereon, the latter has a right to defend himself, and if in a personal conflict between them brought on by the passenger's wrongful assault, the latter is injured, the railway company is not liable. (p. 596.)

STREET RAILWAYS—Passengers—Duty and Rights of Conductors.—A conductor on a street-car is charged, for the protection of his passengers, with the duty of preserving the peace on his car, but this duty cannot be merged with his right to resent an insult to himself, and it does not justify him in following a passenger to the sidewalk to continue a quarrel with him, nor does it relate to quarrels, entirely off the car, nor does it justify the conductor in using unnecessary force. (p. 598.)

STREET RAILWAYS—Assaults by Passengers or Conductors. Although a passenger on a street-car assaults the conductor thereon, this does not of itself justify the conductor in killing the passenger either on or off the car. If the passenger assaults the conductor and pulls him off the car, and a subsequent fight between them results in the killing of the passenger, the car company is not liable, but if, after the passenger assaults the conductor, he tries to get off the car and the conductor holds him and follows him off the car and kills him, the company is liable. (pp. 598, 599.)

Boyle, Priest & Lehman and G. W. Easely, for the appellant.

A. R. Taylor, for the respondent.

266 VALLIANT, J. Plaintiff is the widow of Michael O'Brien, who was killed by a conductor of one of defendant's street-cars, as the petition charges, "whilst in charge of its said car, as driver and controller, negligently and with criminal intent." The suit is founded on section 2864 of the Revised Statutes of 1899.

The plaintiff's evidence tended to prove as follows: Michael O'Brien, plaintiff's husband, was a passenger on one of defendant's street-cars; his destination was Twelfth and Hebert streets; on approaching that crossing he signaled the conductor to stop there, but the car passed Twelfth street and went on to Thirteenth, and there stopped for him to alight. O'Brien was provoked at being carried past his stopping place, and spoke angrily to the conductor about it, and a quarrel of words between them ensued. During the quarrel O'Brien was getting off the platform of the car backward, facing the conductor who was striking him, or striking at him, with the butt end of a pistol he held in his hand. When O'Brien stepped down from the platform the conductor followed him to the sidewalk, holding to him and beating him with the pistol. Arriving on the sidewalk the two men clinched, O'Brien got behind the conductor and threw his arms around him, holding his (the conductor's) arms down by his side, and in the struggle the conductor pointed his pistol around and fired, inflicting a wound from which O'Brien died two days later.

The testimony on the part of defendant tended to prove as follows: When O'Brien asked the conductor to stop at Twelfth street, the conductor said he would give the signal, but that he did not think the motorman would [267] or could stop there because of the condition of the street; he gave the signal, but the car did not stop until it got to Thirteenth street. O'Brien became angry at being carried past Twelfth street and used abusive language to the conductor, and passing the conductor on the rear platform struck him a blow on the side of the head, then grabbed him by the lapel of his coat and dragged him off the car and struck at him twice but missed him; the conductor reached into his pocket and got his pistol; when he drew it out he had a handkerchief fastened around it and he struck at O'Brien two or three times, holding it by the barrel. Some one at that time came up behind the conductor and he turned around, and as he did so, O'Brien seized him from behind and pinned his arms down to his side, and in that way they scuffled and fell, and in the fall the pistol was discharged.

Under the conflicting evidence as shown in the above statement, the jury, if properly instructed, would have been justified in returning a verdict for the plaintiff if they believed her witnesses in preference to those of the defendant, and they would have been justified in finding for the defendant if they believed its witnesses in preference to those of the plaintiff. The verdict was for the defendant, but the court sustained the plaintiff's motion for a new trial on the ground that it had erred in the instructions given at the request of the defendant. The questions on this appeal relate entirely to the instructions so given.

Appellant takes the position that as this killing occurred on the sidewalk, the conductor was beyond the field in which his act as servant was chargeable to the master, and for that reason the plaintiff on her own evidence was not entitled to go to the jury.

We have now to look, not only to the law of master and servant, but also to that of carrier and passenger. It is the duty of the carrier not only to exercise care to carry the passenger safely to his destination, but [268] also to afford him opportunity to alight in safety. In 3 Thompson on Negligence, section 3518, it is said: "At the outset it is to be remembered that the person attempting to alight from the carrier's vehicle is still a passenger until he has accomplished the act of alighting in safety; and that the street-car company is a carrier of passen-

gers, and owes to the passenger attempting to alight that very high degree of care and attention which the law puts upon it generally, to the end of promoting the safety of its passengers. The degree of care required under these circumstances has been described as the greatest care consistent with the practical operation of its cars." While the passenger is in the carrier's vehicle he is entitled to protection from assault even from strangers, if by the exercise of the degree of care devolving on the carrier it can be afforded, and a fortiori the carrier owes it to his passenger not to maltreat him by the hands of its own servants: Hutchinson on Carriers, secs. 595, 596. Quoting again from 3 Thompson on Negligence, sections 3185, 3186, the author says that the law implies not only an agreement to carry safely, "but also an agreement for kind, considerate, respectful and decorous treatment to the passenger at the hands of the carrier's own servants. . . . . The carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment en route."

If it be conceded, therefore, that under the law of master and servant the conductor was outside of the field of his employment when he followed (if he did so) this man to the sidewalk and assaulted him, still under the law of carrier and passenger the man was under the care and entitled to the protection of the carrier, not only while he was in the car, but while he was alighting, and until the act of alighting had been entirely accomplished. Whilst it is true a conductor [269] is not employed to follow passengers out to the sidewalk and beat or shoot them, yet they are employed to protect them from assault while they are leaving the car and to see that they alight in safety. If a stranger on the car had done to this man what the evidence for plaintiff tends to show the conductor did, and if the conductor could have prevented the wrong by the exercise of a very high degree of care and failed to do so, the defendant would have been liable; with what stronger reason, therefore, is the defendant liable when the conductor himself is the offender.

But whilst care on the part of the carrier for the safety and kind treatment of the passenger are required, yet so also are required care on the part of the passenger for his own safety and decent behavior. If the passenger assaults the conductor, the latter has a right to defend himself, and if in a personal

combat between the passenger and the conductor, brought on by the passenger's wrongful assault, the latter is injured, the carrier is not liable. If, as the defendant's evidence tended to prove, O'Brien struck the conductor and then seized him and dragged him off the car to the sidewalk, it was then an affair between man and man, and the defendant was not liable for what happened on the sidewalk.

It was a fair case under the evidence for the jury if the instructions had been right.

The following are the only instructions criticised: "2. The court instructs the jury that if they believe from the evidence that plaintiff's husband, just before alighting from said car at Thirteenth and Hebert, called the conductor thereof vile names and struck said conductor, and that said conductor, in resenting said insult and repelling said assault, then struck plaintiff's husband, and that he dragged said conductor from said car and that a fight then ensued on the ground, off of said car, between him and said conductor, in which said plaintiff's husband was shot, and that as a result of [270] said shooting he died, then said plaintiff is not entitled to recover, and your verdict must be for the defendant.

"3. The court instructs the jury that if they believe from the evidence that plaintiff's husband cursed the conductor on said car and called him vile names while in the act of alighting from said car, and that at that time said conductor had neither struck plaintiff's said husband nor cursed him, such conduct on the part of said plaintiff's husband was disorderly and constituted a breach of peace; and if they further believe from said evidence that said conductor, in resenting said insult, engaged in a fight with said plaintiff's husband on the street off of said car, but not upon said car, in the course of which said plaintiff's husband was shot, and that he died from said injuries, then said plaintiff is not entitled to recover, and your verdict must be for the defendant.

"4. If you find from the evidence in this case that plaintiff's husband struck the defendant's conductor before said conductor had made any assault whatever upon him, and if you further believe from the evidence that said plaintiff's husband and said conductor then engaged in a fight on the street off said car, in the course of which said plaintiff's husband was shot, and although you find that said plaintiff's husband died as a result of said injury, the plaintiff is not entitled to recover, and your verdict must be for the defendant.

"5. The court instructs the jury that if from the evidence they believe that plaintiff's husband assaulted the conductor of said car as he was alighting therefrom, said conductor was justified in defending himself, and should they further believe from the evidence that said conductor did defend himself from said assault, should they find there was one, and that, while so defending himself, there was a fight on the street off of said car between plaintiff's husband and said conductor, in which said plaintiff's husband was shot, and [271] that as a result of said shooting he died, then said plaintiff is not entitled to recover.

"6. If the jury believe from the evidence that the deceased seized the conductor and pulled him off the car, then the conductor had a right to strike the deceased for the purpose of resisting, being pulled from the car, and if the jury further believe that deceased succeeded in pulling the conductor from the car and then engaged in a physical conflict with him, then the conductor had a right to resist any assault that deceased made on him, and even if the jury believe that the conductor did more than was necessary to resist such assault, and in doing so shot deceased, yet the defendant is not liable for the conduct of such conductor, and the verdict must be for defendant.

"7. Although the jury believe from the evidence that the conductor voluntarily followed the deceased off the car, and there and not upon said car, got into a physical conflict with him, and as a result of such conflict, deceased was shot by the conductor as alleged, yet such voluntary act of the conductor in getting off of said car, and voluntarily engaging in a conflict with deceased and voluntarily shooting him, was no part of his duty as conductor, and defendant is not liable for the consequences of such shot, and the verdict must be for defendant."

From the principles above laid down we conclude that there was no error in instruction 2. It supposes the case in which the plaintiff's husband was the assailant, and instead of being interfered with in leaving the car, he dragged the conductor to the sidewalk, and the combat there was the natural result of his own conduct.

Instruction 3 is erroneous. It supposes the case of the passenger's disorderly conduct while in the act of alighting in cursing and calling the conductor a vile name, thereby causing a breach of the peace, and the conductor, in resenting the insult, engaged in a fight with him on the street off the car, in which fight the passenger [272] was shot. The writer of that instruction had in mind the authority of the conductor to pre-

serve the peace. A conductor is charged, for the protection of his passengers, with the duty of preserving the peace on the car of which he is in control. But in this instruction the duty of the conductor to preserve the peace in the interest of his passengers is merged in his own right to resent an insult. The instruction drops out of view, as if it were immaterial, the question of whether the conductor was dragged off of the car as defendant's evidence tended to prove, or voluntarily followed the plaintiff's husband to the sidewalk and there undertook to preserve the peace.

It would be an extraordinary case, of which no example now occurs to us, that would justify a conductor in his capacity as a preserver of the peace to follow the offender to the sidewalk. And even in suppressing violent conduct to preserve the peace, the question of whether unnecessary force was used should be considered, and that question was omitted in the third instruction.

The fourth instruction is to the effect that if O'Brien struck the conductor before the latter had made any assault on him and a fight ensued on the street off the car, during which the conductor shot and killed O'Brien, the defendant is not liable.

Suppose it had all happened on the car—suppose O'Brien struck the conductor, and a fight ensued, and in the course of the fight the conductor drew his pistol and shot him—can we say with those facts and nothing more that the company was not liable? The law does not degrade the manhood of a conductor; he is entitled to resent an insult or repel an assault, but an insult or a blow does not, under all circumstances, justify the killing of the assailant. Even if the slayer was answering to an indictment in such case, he would have to show something more than that he had been insulted or struck in order to be entirely acquitted. But here we [273] are supposing a man who, although, it may be, was misbehaving, yet still was, in a measure, under the care and protection of this conductor, who was then and there pro hac vice the carrier itself; can it be said that because the man was abusive in his language and struck the conductor, the latter had the right to shoot him down? If the company would be liable under those facts if the killing occurred on the car, then it might or might not, according to circumstances, be liable if the killing occurred off the car. If, after striking the conductor, the deceased seized him and pulled him off of the car to the sidewalk, and the fight there ensued, the defendant would not be liable. But if, after striking the

conductor, the man was trying to get off the car and the conductor was holding him and beating him and thus followed him to the sidewalk and killed him, the company would be liable. Instruction 4, therefore, was erroneous.

The fifth instruction leaves out of view the question of whether the conductor after being struck by the deceased began "defending himself" by beating him with the butt end of his pistol as he was leaving the car and followed him still beating him to the sidewalk, as the plaintiff's evidence tends to prove, or was first assaulted and then dragged off of the car by the plaintiff's husband, as the defendant's evidence tended to prove. Under this instruction if the plaintiff's husband struck the conductor before leaving the car, then as a matter of personal defense the conductor had a right to follow the deceased off the car, beating him with his pistol until they reached the sidewalk and then kill him without involving the defendant in liability for his act. That instruction should not have been given.

From what has already been said it was not error to give the sixth instruction, but it was error to give the seventh.

274 The learned judge decided correctly in sustaining the motion for a new trial on account of errors in the instructions.

The judgment is affirmed.

All concur, except Robinson, J., absent.

Who are Passengers, and when they become or cease to be such, is considered generally in the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 75-104. And this question, as applied to street railways, is considered in the recent note to Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 584-589.

A Street Railway Company is bound to protect its passengers from injuries and assaults by its employés, and its liability for a breach of such duty does not depend upon the assault being committed by one acting within the scope of his employment: Citizens' St. R. R. Co. v. Clark, 33 Ind. App. 190, 104 Am. St. Rep. 249. See, too, Central of Georgia Ry. Co. v. Motes, 117 Ga. 923, 97 Am. St. Rep. 223, and cases cited in the cross-reference note thereto. The company may be liable in exemplary damages, if the assault is malicious: Lexington Ry. Co. v. Cozine, 111 Ky. 799, 98 Am. St. Rep. 430. See, too, Gillespie v. Brooklyn Heights R. R. Co., 178 N. Y. 347, 102 Am. St. Rep. 503.

REGAN v. WILLIAMS.

[185 Mo. 620, 84 S. W. 959.]

MORTGAGES—Extension of Note.—An agreement to extend the time of payment of a mortgage note when due, upon payment of the interest and part of the principal, is without consideration, and the creditor may, if he chooses, immediately press for payment despite his agreement to extend, and a surety on the note is not released by such agreement. (p. 602.)

LIMITATION OF ACTIONS.—Assumption of Mortgage Debt by the vendee of land converts him into a principal of the mortgage note and the vendor into a surety, and the owner of the note knowing of such arrangement is bound to recognize the parties in these respective capacities. In such case, the vendor and vendee are not joint obligors, and payment of interest by the latter on the mortgage note does not stop the running of the statute of limitations on the note as to the vendor. (p. 603.)

LIMITATION OF ACTIONS—Credit on Mortgage Note.—A credit on a mortgage note made by the trustee of the proceeds realized from a foreclosure sale of the mortgaged property does not stop the running of the statute of limitations in favor of the original payor of the note. (p. 605.)

McReynolds & Halliburton, for the appellant.

E. J. White, for the respondent.

626 Per CURIAM. This cause comes to this court on a certificate by the St. Louis court of appeals that the opinion of said court herein is in conflict with an opinion by the Kansas City court of appeals in Bender v. Markle, 37 Mo. App. 234.

The statement and opinion by Goode, J., of the St. Louis court of appeals is as follows:

"March 21, 1887, the respondent executed to Timothy Regan, the father of the appellant, a promissory note for four thousand dollars, due two years after date and bearing compound interest at the rate of eight per cent. The note was given for part of the purchase price of some land in Springfield, and to secure it a deed of trust was executed and delivered on the same day, by the defendant and wife, to Charles H. Goffe, trustee for said Timothy Regan, beneficiary. It contained the usual covenants and powers to the trustee to sell in case of default, 'and receive the proceeds of the sale, out of which should be paid, first, the costs and expenses of this trust and next all amounts expended for taxes and other purposes, and

next the amount that may remain unpaid on said note and the interest thereon.' November 29, 1887, the defendant and wife conveyed the real estate covered by said deed of trust to the Scott Investment Company, which, with the full consent and approval of the payee, Regan, assumed and agreed to pay the note as part of the purchase price of the land. Interest was paid at the end of each year to March 21, 1890, on which date not only the interest, but one thousand dollars of the principal, was paid by the Scott Investment Company. The following indorsement was put on the note: 'Paid on the within, $1,000 as principal in part, and $320 as interest to March 21, 1890, and time on balance of note extended one year.' September 4, 1890, the Scott Investment Company conveyed the land to A. W. Carey, who likewise assumed and agreed to pay the encumbrance on it. Interest was paid to March 21, 1892. Afterward, defaults occurred, [627] and on the seventeenth day of May, 1894, the trustee, Goffe, at the request of the beneficiary, sold the property under the deed of trust for two thousand dollars, and after deducting the expenses of the sale credited the remainder, nineteen hundred and thirty-four dollars and eighty cents, on the note. The present plaintiff was the owner and holder of the instrument when this action was commenced, but is affected by whatever equities exist against the payee. The defenses are that Williams was released by extensions given by Timothy Regan, and that the debt was barred by the statute of limitations. There is testimony tending to prove that the Scott Investment Company purchased the property with an understanding with Regan that the time of payment should be extended, and would not have purchased without it. The trial court made a special finding of the facts, in which it found against the view that there was an agreement as to the extension of time when Williams sold to the Scott Investment Company. It also found that the defendant had neither made, nor caused to be made, any payment on the note except that the trustee, under the authority of the deed of trust, credited thereon the amount received at the sale. This finding is supported by the evidence. The action was instituted on the fourth day of May, 1900.

"1. The sale of the land by the original mortgagor, Williams, to the Scott Investment Company, and the assumption of the encumbrance by the latter, converted said company into the principal debtor with reference to the encumbrance, and the defendant into a surety: Wayman v. Jones, 58 Mo. App. 313; Nel-

son v. Brown, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; Pratt v. Conway, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028. Timothy Regan, who then held the note and knew all about the arrangement, was bound thereafter to recognize said parties in those capacities: Nelson v. Brown, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960.

"We must be controlled by the finding of the lower court that there was no agreement for an extension of the time of payment, either between Williams and the Scott Investment Company, or between the latter and [628] Timothy Regan, at the time the company purchased the land. When the extension was entered on the note, the entire principal and one year's interest were due. The accrued interest and one thousand dollars of the principal were paid. It is the law in this state that a contract like that, for the extension of the time of payment, is without consideration and not binding, so that the creditor may, if he chooses, immediately press for payment despite his agreement to extend; that therefore a surety is not released by such a transaction between the maker and payee: Brown v. Kirk, 20 Mo. App. 524; Owings v. McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154. In some jurisdictions the rule is otherwise where there is not simply an agreement to forbear proceedings to collect, but a formal, executed stipulation to postpone the maturity of the instrument: Benson v. Phipps, 87 Tex. 580, 47 Am. St. Rep. 128, 29 S. W. 1061, and many cases cited. The decisions of the court to which we owe fealty must be followed and we approve the ruling of the learned trial judge that the extension did not discharge the defendant as surety.

"2. In reply to the defense that the statute of limitations had run against the note before this action was begun, plaintiff asserts that the payments of interest by the Scott Investment Company and Carey to March 21, 1892, prevented the running of the statute, not only in favor of said parties but of the defendant as well. The ruling that payment by a principal will suspend the statute as to a surety, is invoked as applicable. because by operation of law, the subsequent grantees of the land covered by the deed of trust became principals and the defendant a surety. The proposition contended for is sound enough, generally speaking: Craig v. Callaway Co. Ct., 12 Mo. 94; McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378; Block v. Dorman, 51 Mo. 31; Vernon County v. Stewart, 64 Mo. 408. 27 Am. Rep. 250; Bennett v. McCanse, 65 Mo. 194. These

payments were made while the note was still alive, and the rule is well established that payments made by the principal, or by one of several [629] joint obligors, before the debt is barred, will stop the statute. But the reason why a payment by the principal stops as to a surety, is not because one is principal and the other surety, but because both are usually joint promisors; that is, the surety is affected by the act of the principal in his capacity as a joint promisor. The idea is that persons who jointly bind themselves are all liable to the promisee by virtue of their original agreement, so that performance or part performance by one is the act of all: Sigourney v. Drury, 14 Pick. 387; Brandram v. Wharton, 1 Barn. & Ald. 463; Atkins v. Tredgold, 2 Barn. & C. 23. The principle only applies where the payment was made by one originally liable: Sigourney v. Drury, 14 Pick. 387.

"Whether or not the statute ceased to run in favor of the defendant when the payments were made by the subsequent grantees, depends, then, on whether he can be considered a joint promisor with them. Undoubtedly he was not. They were not parties to the note when it was made, and only became obligated to pay it by subsequent contracts between themselves and the maker, Williams. Their responsibility, far from resting on a promise by them given in conjunction with Williams to the payee, Regan, rests exclusively on the promises they made afterward to assume the debt. In no sense were they joint obligors with him. Their promises neither coincided with his in point of time, nor were made with the same person, nor based on the same consideration. They were separate and distinct undertakings: Maddox v. Duncan, 143 Mo. 621, 65 Am. St. Rep. 678, 45 S. W. 688, 41 L. R. A. 581; Corbyn v. Brokmeyer, 84 Mo. App. 649. Those cases hold that a payment made by one whose promise is collateral does not interrupt the statute as to the original obligor. The precedents are all against this contention of the appellant: Trustee of Old Almshouse v. Smith, 52 Conn. 434; Cotterell v. Shepherd, 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983; Barlock v. Ashberry, 19 Ch. D. 539; Home [630] Life Ins. Co. v. Elwell, 111 Mich. 689, 70 N. W. 334; Princeton Sav. Bank v. Martin, 53 N. J. Eq. 463-465, 33 Atl. 45; Underwood v. Patrick, 94 Fed. 468, 36 C. C. A. 330; Zoll v. Carnahan, 83 Mo. 35, is in point by analogy. We hold that the payments of interest made by the Scott Investment Company and by Carey did not prevent the statute from running in favor of the defendant.

"3. It is insisted by the appellant, in the second place, that the case is taken out of the statute by the credit Goffe, the trustee, put on the note, of the proceeds arising from the foreclosure sale of the land. The trustee, it is claimed, was the agent of both the mortgagor and mortgagee, and for certain purposes he was; not for that one, however. It was his duty to protect the interests of both parties in the performance of his office, and he was liable to either for damages resulting from his misfeasance: Sherwood v. Saxton, 63 Mo. 78. We do not find in the deed of trust any clause authorizing the trustee to enter a credit on the note of the proceeds of sale in case of foreclosure, but such an act was in the scope of his legal authority. To say that he was empowered by Williams to make such a credit on the latter's behalf, or that it was contemplated or expected he should do so when the deed of trust was executed, would be, in our estimation, a very strained deduction. Notes secured by deeds of trust are commonly paid and the trustee not called on to act; often the land passes from the mortgagor before the debt falls due, under an agreement by the purchaser to assume and pay the encumbrance, as happened here. Williams had no control over the trustee, whose agency, as far as it went, was irrevocable. It is going too far, then, we think, to hold the trustee first named, or his possible successors in the persons of different sheriffs, was or were empowered or appointed by the mortgagor to bind him at any subsequent date by crediting the proceeds of a foreclosure on the note. As has well been said, it is not the indorsement of a credit [631] but the payment that operates as a renewal of a promise and removes the bar of the statute of limitations: Curtis v. Nash, 88 Me. 476. The party relying on a payment to stop the statute must not only establish that it was made, but made by the authority of the defendant: Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418; Bender v. Blessing, 82 Hun, 320, 31 N. Y. Supp. 481. 'Part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it': 1 Wood on Limitations, 3d ed., sec. 99. The payments must be made by or with the consent of the payor: Gardner v. Early, 78 Mo. App. 346; Phillips v. Mahan, 52 Mo. 197. If credits are entered by the holder, without the knowledge or consent of the payor, they are ineffective to check the statute: Goddard v. Williamson, 72 Mo. 131; Loewer v. Haug, 20 Mo. App. 163. The prima facie showing,

from the fact that the credits were entered when it was against Regan's interest to do so, is overcome by the positive proof that the defendant had nothing to do with them and knew nothing about them.

"The credit made by the trustee, instead of being the result of a payment directed by Williams expressly or by necessary implication, was made in invitum. It was a collection enforced by foreclosing the security.

"The question we are considering has been several times passed on by the courts and we believe, with one exception, the judgment was that such an application by the trustee or mortgagee of the money obtained by sale did not stop the statute. It was so held by this court in Leach v. Asher, 20 Mo. App. 656. The Kansas City court of appeals ruled differently in Bender v. Markle, 37 Mo. App. 234, without noticing the previous case. These opposing decisions were commented on by the supreme court of Nebraska in a controversy as to the effect of such a credit by the trustee in a deed [632] of trust on lands in Missouri. The proposition is ably discussed in that opinion and the view of this court adopted on the ground, 'that such payment was not a voluntary one on the part of Carr (the mortgagor) but one made in invitum and by operation of law': Moffitt v. Carr, 48 Neb. 403, 58 Am. St. Rep. 696, 67 N. W. 150. To the same purport is the impressive voice of the supreme court of Massachusetts in a recent case. The opinion says:

"'The ground upon which a part payment is held to take a case out of the statute is, that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect, it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment: Roscoe v. Hale, 7 Gray, 274; Stoddard v. Doane, 7 Gray, 387; Richardson v. Thomas, 13 Gray, 381, 74 Am. Dec. 636. In the case at bar, the plaintiff executed a mortgage in which he gave to the mortgagee a power to sell the estate and to appropriate the proceeds to the payment of the mortgage debt. But this cannot fairly be construed as an authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations. At the time of the sale, the plaintiff had no interest in the property. He had no right to the proceeds of the sale. The money which, it is claimed, was ap-

plied in part payment of the note, was not his money. It would be applied by law to the extinguishment pro tanto of his debt, but the application was not under his control and involved no action of his mind. It does not appear that he had any knowledge of the sale. It is absurd to say that the facts in this case would fairly lead to the inference that the plaintiff intended to renew his promise to pay the note: Campbell v. Baldwin, 130 Mass. 199.

"It is noteworthy that the law in Massachusetts and Nebraska is that a sale by a pledgee of collateral [633] security and the application of the money in part payment of the debt will toll the statute. But the supreme courts of those states did not think such instances analogous to this one, which they likened rather to transactions in which credits are given for dividends declared by an assignee, that are always held not to stop the course of the statute in favor of the debtor: Marienthal v. Mosler, 16 Ohio St. 566; Stoddard v. Doane, 7 Gray, 387; Pickett v. King, 34 Barb. 193; Roosevelt v. Mark, 6 Johns. Ch. 266; Light's Estate, 136 Pa. St. 211, 20 Atl. 536, 537. Involuntary payments are, we believe, usually held not to take the case out of the statute: Whitney v. Chambers, 17 Neb. 90, 52 Am. Rep. 398, 22 N. W. 229; Roscoe v. Hale, 7 Gray, 274; Stoddard v. Doane, 7 Gray, 387; Battle v. Battle, 116 N. C. 161, 21 S. E. 177.

"In Hughes v. Boone, 114 N. C. 54, 19 S. E. 63, it was ruled that a partial payment of a judgment made on execution would not interrupt the running of the statute. It is held that the credit is applied by the assignee as a legal duty and not by direction of the assignor. So it is of the credit by a trustee or mortgagee. The proposition that such an act by either affects the statute as to the mortgagor is incompatible with the principle on which payments are given suspensive effect. This principle, as stated, is that the payments, whether made by the mortgagor in person or by his accredited deputy, are a recognition by him of his debt and a tacit promise to discharge it. The reasoning which deduces such a conclusion from the credit made by the trustee or mortgagee is extremely artificial, in fact opposed to common knowledge. Is it consistent with the ordinary conduct of men to think that Williams desired or empowered Goffe to bind him to pay his note by the credit which the latter indorsed?

"The decisions have gone quite far enough toward defeating the purpose of the limitation law: Woonsocket Inst. v. Ballou,

16 R. I. 351, 16 Atl. 144, 1 L. R. A. 555. The inhospitable reception accorded by the courts to the two [634] great legislative policies embodied in the statutes of limitations and of frauds has often provoked regret, and a disposition more favorable to them has supervened. We have no inclination to encroach further on the limitation law or create fresh exceptions to it, and rule, therefore, that the credit made by Goffe does not impair the defense of the statute, and affirm the judgment."

The foregoing opinion of the St. Louis court of appeals correctly announces the law upon the facts of this case and is in all things approved and adopted as the opinion of this court, and the views expressed by the Kansas City court of appeals in Bender v. Markle, 37 Mo. App. 234, in conflict therewith, are disapproved and will no longer be followed.

For the reasons assigned by the St. Louis court of appeals, the judgment of the circuit court is affirmed.

All concur except Judge Lamm, who was not a member of the court when the cause was submitted.

A Grantee who covenants with the grantor to pay off a mortgage on the premises becomes in equity the principal debtor in respect to the mortgage debt, and the grantor becomes his surety: Klapworth v. Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69. See, too, Nelson v. Brown, 140 Mo. 580, 62 Am. St. Rep. 755; Farmers' Nat. Bank v. Gates, 33 Or. 388, 72 Am. St. Rep. 724; Daniels v. Johnson, 129 Cal. 415, 79 Am. St. Rep. 123; Hull v. Hayward, 13 S. Dak. 291, 79 Am. St. Rep. 890.

A Grantee of a Mortgagor who assumes and agrees to pay the mortgage does not, by subsequent payments of part of the principal and interest, toll the statute of limitations as against his grantor, the original mortgagor: Cottrell v. Shepherd, 86 Wis. 649, 39 Am. St. Rep. 919. See, too, Mozingo v. Ross, 150 Ind. 688, 65 Am. St. Rep. 387.

STATE v. HARTLEY.

[185 Mo. 669, 84 S. W. 910.]

CONSTITUTIONAL LAW—Statute Declaring Attempt to Produce Abortion to be Manslaughter.—A statute which declares any person guilty of second degree manslaughter who administers to any pregnant woman any medicine or drug, or uses any instrument or other means to destroy the foetus or child of such woman, unless necessary to preserve her life, is void as an attempt to create a felonious homicide, where neither the death of the woman nor of the child is the necessary result of the act or acts committed, and where there is no killing. (p. 610.)

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

T. B. Harvey, for the respondent.

670 BURGESS, P. J. At the December term, 1903, of the St. Louis circuit court the defendant, Elizabeth Hartley, was indicted for manslaughter under the provisions of section 1825 of the Laws of 1901. The indictment avers that Elizabeth Hartley, "at the city of St. Louis, on or about the twentieth day of September, 1903, unlawfully and feloniously did administer to one Bessie Zucker, who was then and there a pregnant woman, certain medicines, drugs and substances (the exact nature of which is to the grand jurors unknown), and did then and there unlawfully and feloniously use and employ certain instruments (the exact nature of which is to the grand jurors unknown) and other means in and upon the said pregnant woman as aforesaid, with the felonious intent then and there and thereby to destroy the foetus and child of said pregnant woman, the same not being then and there necessary to preserve the life of such woman; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

Upon motion of defendant the indictment was quashed. The state appeals.

The act under which the indictment was preferred provides that "Every person who shall administer to any pregnant woman any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means with intent thereby to destroy the foetus or child of such pregnant woman, unless the same shall be necessary to preserve the life of such woman, shall be guilty of manslaughter in the second degree."

One of the objections urged against the indictment in the court below, and now insisted upon in this court, is that it does not charge defendant with any offense.

671 It is contended by defendant that the judgment should be affirmed because the law under which the indictment is drawn and the defendant charged with manslaughter is inoperative and invalid, in that it undertakes to establish a degree of felonious homicide where neither the death of the child nor of the mother resulted from the acts committed, and where there was no killing or homicide. There can be no manslaughter at common law where there is no homicide. "Manslaughter" is distinguished from murder solely by the absence of malice as a constituent element of the crime. It is not the intent to kill, or the character of the weapon used, which determines the grade of the homicide, but simply the inquiry whether such intent, or the use of such weapon, proceeded premeditatedly from that wickedness of disposition and hardness of heart which the law denominates malice, or whether the intent was formed suddenly under the influence of some violent emotion, which, for the instant, overwhelmed the reason of the slayer. If from the former, the crime is murder; if from the latter, it is manslaughter only: 21 Am. & Eng. Ency. of Law, 2d ed., 173, and authorities cited.

While all kinds of homicide, not murder, are declared to be manslaughter by our statute, and all grades of homicide classified by it, there can be no manslaughter when there is no homicide, no more than there can be murder when there is no homicide.

In the case at bar the indictment does not allege the death of either the mother or the child with which she is alleged to be pregnant, and the legislature could not make that manslaughter when the basis of its legislation did not in fact exist.

In the case of State v. Young, 55 Kan. 349, 40 Pac. 659, the supreme court of that state had under consideration a statute in almost the exact language of the statute involved in the case at bar, and it was held to be inoperative and invalid upon the ground that it undertakes 672 to establish a degree of felonious homicide where neither the death of the child nor of the mother resulted from the acts committed and where there was no killing or homicide. The court said: "We think the court rightly held that section 15 is without application or force. It appears to be an attempt to define and establish a degree of felonious homicide where there may be no

killing or homicide. The section, supposed to be complete in itself, omits one of the essential elements of homicide, namely, that the death of the child or mother should ensue from the means employed. If the medicine administered or the instruments employed on a woman pregnant with a quick child should be used or employed with intent to destroy the child, and where it was not necessary to preserve the life of the mother, or had not been advised by a physician to be necessary for that purpose, and no injury resulted to the mother or to the child, it cannot be possible that the person charged could be convicted of felonious homicide. It was probably not the purpose nor was it competent, for the legislature to make that a degree of felonious homicide which in truth and in fact is not homicide, and where the acts prohibited and proposed to be punished do not result in death."

The judgment should be affirmed, and it is so ordered.

All concur.

Acts Which the Legislature may or may not make criminal are discussed in the monographic note to Booth v. People, 78 Am. St. Rep. 235-274.

ABLES v. WEBB.

[186 Mo. 233, 85 S. W. 383.]

EJECTMENT—Possession.—Although a cause of action in ejectment accrued fifteen years before suit brought, that fact is immaterial if there has been no such open, actual, unbroken adverse possession as created title in defendant by limitation. (p. 611.)

EXECUTION SALES—Collateral Attack.—Title to land under a sale, on an execution issued by a circuit clerk on a justice's transcript, cannot be collaterally attacked on the ground that the precedent execution issued by the justice was directed to the wrong constable. (p. 615.)

EXECUTIONS—Collateral Attack.—A constable's return of an execution, premature by one day, cannot be collaterally attacked, where the interests of third parties only are involved. (p. 616.)

EXECUTIONS—Sufficiency of Return.—If a constable's return of an execution complies with the spirit of the statute, and is substantially in the form prescribed by it, it is sufficient. Hence such return reciting "no other property found on which to levy this writ" is a sufficient return of nulla bona. (pp. 616, 617.)

EJECTMENT—Equitable Title.—A person must proceed in equity to enforce his equitable rights, and is not allowed in ejectment to recover on a mere equity, although he may set up such title as an equitable estoppel to preclude the defendant of the benefit of a given conveyance. (p. 617.)

Thomas & Hackney, for the appellant.

P. F. Coste, O. D. Royse and H. Gray, for the respondents.

238 LAMM, J. This is a suit in ejectment to recover of Webb, tenant, and the Leonard Mercantile and Realty Company, his landlord, the southwest quarter of section 23, township 28, range 32, lying in Jasper county, Missouri, on a petition in common form, laying the ouster at an unnamed day in 1894. The answer was a general denial.

At the trial it was admitted the defendants were in possession; that the plaintiff had been ousted; that plaintiff, if entitled to recover, could recover only an undivided half interest in the land; that defendants 239 denied her cotenancy, and that plaintiff's husband had been dead fifteen years when she institute her suit.

Though plaintiff had been discovert for fifteen years, and though her cause of action, if any, accrued under a sheriff's deed executed on October 10, 1878, yet as there was no such actual, open, unbroken and adverse possession in defendants and those under whom they held as to create a title by mere flux of time, the testimony on that branch of the case becomes immaterial.

Plaintiff, to show legal title and present possessory right in her, put in evidence the following duly recorded muniments of title: 1. A patent from the United States to David E. Moter, dated in 1873; 2. A warranty deed from said Moter to John Ables and Thomas F. Phillips, dated in 1875; 3. A deed from Beamer, sheriff of Jasper county to plaintiff, dated October 10, 1878, reciting that one W. A. Moter recovered judgment in the common pleas court of Jasper county on the fifth day of January, 1877, against Thomas F. Phillips, John Ables and A. B. Parkell for thirty-five dollars and seventy cents and costs, on which execution issued on May 30, 1878, levy made on September 10, 1878, seizing the right, title and interest of said Phillips and Ables in lots 1, 2, 3 and 4 in Regans' addition to the city of Carthage, and also an undivided half interest in the real estate sued for, a sale, made in bulk on October 7, 1878, to plaintiff as the highest bidder for eighty-three dollars and thirty-one cents, and a conveyance of the estate of Ables and Phillips in all said real estate to plaintiff. (This title deed will be hereinafter referred to as conveyance "A" for convenience of identification.)

Plaintiff then rested.

Defendants put in evidence the following duly recorded title papers to show legal title and present possessory right in them:

240 1. A deed from said Beamer as sheriff, dated January 16, 1878, reciting the same judgment referred to in conveyance "A," the issue of execution on October 23, 1877, a levy as of October 26, 1877, on the right, title and interest of the judgment defendant, Thos. F. Phillips, in the real estate in question, together with his interest in certain lots in Holman's, in Bulgin's and in Elizabeth James' additions to the city of Carthage, a sale made in bulk to the judgment creditor, W. A. Moter, as the highest bidder, for seven dollars and fifty cents, and the conveyance of the estate of said Thomas F. Phillips in all said real estate to said W. A. Moter. (For convenience this deed will be hereinafter referred to as conveyance "B.")

2. A deed from said Beamer, sheriff, to one James P. Betts, dated September 18, 1878, reciting that three Cohns recovered judgment against W. A. Moter before one Tuttle, a justice of the peace of Marion township, Jasper county, for twenty-eight dollars and forty-five cents, on January 12, 1877, that a transcript was filed in the office of the circuit clerk of said county on February 2, 1877, an execution issued from said office on August 7, 1878, a levy as of August 17th, seizing the interest of said Moter in the real estate sued for, a sale made on September 16, 1878, to James P. Betts, as the highest bidder, for eight dollars and fifty cents, and a conveyance of the estate of said Moter in said land to said Betts. (For convenience this deed will be hereinafter referred to as "C.")

3. A deed from said Betts to one Hall conveying whatever title he acquired under "C," of date August 4, 1879.

4. A deed from John Ables to Thomas F. Phillips conveying his undivided half of the real estate in suit, under date of December 21, 1876.

5. A deed of trust from Thomas F. Phillips, dated June 1, 1877, conveying the said real estate to Wilson, trustee for Clark, and securing money loaned. (Hereinafter referred to as conveyance "D.")

241 6. A trustee's deed, reciting the foreclosure of "D," executed by Thomas, successor to Wilson, trustee, dated September 14, 1878, and conveying the land to said Hall.

7. A deed for the same premises from said Hall on August 28, 1893, to the Homestead Land Company, and a deed from said company to the defendant company dated October 25, 1898.

To fortify the sheriff's deed evidenced by "C," the defendants introduced the following:

8. The transcript of Tuttle, justice of the peace, filed as aforesaid, showing a judgment in due form on proper service in favor of the said Cohns against W. A. Moter, and narrating, inter alia, that an execution had issued thereon from the justice court on January 12, 1877, returnable in sixty days.

9. The execution itself directed to the constable of Marion township, Jasper county, dated January 12, 1877.

10. The return dated March 12, 1877, indorsed on said execution by said constable, which return set forth a garnishment of John Ables and Frank Phillips, and concludes thus: "by returning this writ no other property found upon which to levy this writ."

11. And further introduced the summons to said garnishees, dated January 12, 1877, commanding them to appear January 18, 1877, before said justice of the peace and answer interrogatories, with the return thereon showing service.

12. Defendants also introduced oral testimony tending to show that nothing was paid on the justice execution.

In rebuttal, plaintiff introduced oral testimony tending to show that W. A. Moter, on the date of the justice execution in Cohn et al. v. Moter, and thereafter, resided in Union township, Jasper county, instead of Marion township; also the written answer of John [242] Ables, as garnishee, admitting for himself and his cogarnishee, Phillips, an indebtedness to Moter on a blank date in 1877 in the sum of thirty-five dollars, which answer was sworn to at a date obliterated, and also introduced record evidence establishing the fact that Moter came into the said common pleas court on December 7, 1878, and filed his motion to have the proceeds of the sale under which plaintiff bought by conveyance "A," paid over to him by the sheriff, and procured an order and got the proceeds.

Defendants prayed no instructions. The plaintiff prayed three: One, a peremptory declaration in her favor; another in effect asking the court to declare the law to be that if Moter was a resident of Union township instead of Marion township from January 12, 1877, to September 16, 1877 (covering the life of the said justice execution and beyond), then the execution issued by the circuit clerk on the transcript judgment, under which Betts bought, was void and conveyance "C" fell with it; and another, in effect, asking the court to declare the law to be that if Moter bought under the first execution issued on his judgment against Phillips, Ables and Parkell, and received a sheriff's deed "B," and afterward caused a second

execution to issue and the undivided half interest of the real estate in dispute to be levied on and sold as the property of the execution defendants, and plaintiff bought at the sale and received conveyance "A" and Moter accepted the proceeds of her bid, then Moter was estopped from denying that plaintiff by such purchase acquired the undivided one-half interest in the property so purchased by her at sheriff's sale, and asserting that plaintiff, as against Moter, became the owner of such interest.

The court refused to so declare the law, plaintiff excepting, and followed its refusal with a judgment for defendants, and plaintiff appeals.

Conveyance "C" being allowed in evidence over [243] the timely objection of appellant and exception saved, appellant renews here her assault on that conveyance, contending that (1) the justice execution was directed to the constable of the wrong township, that (2) it is prematurely returned, and that (3) the return thereon was not sufficient to constitute a return of nulla bona and, ergo, the transcript execution from the circuit clerk's office under which Betts bought was improvidently sued out and void, thereby making Bett's deed worthless.

If conveyance "C" falls under such attack, there would be left an outstanding title in W. A. Moter, acquired by conveyance "B," which must be reckoned with, and which, undisposed of, would defeat appellant, who must recover, if at all, on the strength of her own and not on the weakness of respondents' title. To surmount this admitted obstacle appellant invokes the doctrine of equitable estoppel and contends that her third instruction should have been given.

On the foregoing facts and questions presented here, can the judgment below, palpably sound on the broad justice of the case at bar, be sustained on the ground of strict legal right? In our opinion it can be, because:

1. Observing the dates of the several deeds, it will be seen the record title was in Phillips when he borrowed, on June 1, 1877, the money secured by the foreclosed trust deed "D." subject, however, to the lurking menace of the live judgment lien in favor of Moter for thirty-five dollars and seventy cents in the case of Moter v. Phillips, Ables and Parkell, in the common pleas court, of date of January 5, 1877; and it is shown by the record that Phillips then title passed to defendant company by foreclosure sale, and mesne conveyances. It will be seen further, that if conveyance "C" be a valid conveyance,

then the title acquired by Moter in enforcing his judgment lien by sale and conveyance to him [244] by conveyance "B," passed to Betts through "C" and to defendant company through mesne conveyances, so that the branch of the title split off by the first sale under the Moter judgment has again become grafted on the title acquired by foreclosing the deed of trust "D," and the full title is in defendant company.

The statute in force at the time of issuing the transcript execution in hand, by the circuit clerk, was section 14, article 7, chapter 82, Wagner's Statute of 1870 (now section 4019, Rev. Stats. 1899), and containing this proviso: "but no execution shall be sued out of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to the constable of the township in which the defendant resides, if there be one in such township, and, if not, to any constable in the county, and returned that the defendant had no goods or chattels whereof to levy the same."

A direct attack on a title under a sale on an execution issued by a circuit clerk on a justice transcript, where the precedent justice execution is claimed to have been directed to the wrong constable, is one thing; a collateral attack is quite another thing, and this court has set its face against such collateral attacks as furnishing a mischievously inviting and easy method of unsettling land titles.

In Waddell v. Williams, 50 Mo. 222, Bliss, J., said: "The purchaser at sheriff's sale is bound to know that the execution is sustained by a judgment, and by such a judgment as still authorizes its issue. No execution can issue to a sheriff upon a justice judgment unless a previous one has been issued to the proper constable and returned nulla bona, and a transcript has been filed. The purchaser then will examine the transcript and certificates, and may inspect the justice's records and files, and in doing so will not be likely to find anything to show the actual residence of the execution defendant. Neither the summons [245] . . . . nor the execution . . . . show such residence, and he will only see the summons was served, the judgment rendered, and the execution properly issued and returned. He has a right to presume that the defendant lived within the justice's jurisdiction, and may safely purchase. If the proceedings have not been regular, those interested may attack them directly and show aliunde facts—as that the constable was not an officer of the township where the defendant resided

—that should set aside the proceedings. But if the party supposed to be injured sleeps, strangers cannot step in."

The Waddell case has been followed and is now a rule of property in Missouri: Pullis v. Pullis, 157 Mo. 592, 57 S. W. 1095. We therefore rule against appellant's assignment of error, based on the refusal of her second instruction.

2. The justice execution was returnable in sixty days, but was returned in fifty-nine days (its life being from January 12, 1877, to March 12, 1877). Did this vice in calculation make the subsequent transcript execution void and overthrow the sheriff's deed "C"? This question is not res integra in Missouri. The precise point was passed on and held adversely to appellant's contention in Whitman v. Taylor, 60 Mo. 127. The Whitman case was never overruled, and where the interests of third parties are involved, the doctrine there announced to the effect that such irregularity is not a weapon of collateral attack remains the law. That no legal principle relating to land title should be changed except on the best of reasons is a proposition standing the test of everyday wisdom and is a beneficial axiom of real estate law: Littlefield v. Ramsey, 181 Mo. 620, 80 S. W. 949. We rule this point also against appellant.

3. Was there sufficient return of nulla bona on the justice execution? The garnishment proceedings resulted in nothing. They seem to be yet held sub judice, [246] though a generation has passed. The record has earmarks from which we infer that the garnishee, "Frank" Phillips, was none other than Thomas F. Phillips, and that he and his cogarnishee, John Ables, were none other than the judgment debtors in the judgment in favor of Moter in the common pleas court, and that the thirty-five dollars Ables referred to in his answer as due by him and Phillips to Moter were the same thirty-five dollars and odd cents of indebtedness merged in Moter's judgment, and collected from them with costs by his two executions referred to in conveyances "A" and "B," but whether this be so, or not so, the fact remains that the garnishment proceedings bore no fruit and were abandoned before the return of the execution. Hence, in final analysis, the reference to them in the constable's return is without value in determining the pivotal question of the sufficiency of the return as a return of nulla bona. These constable returns must not be weighed as with a goldsmith's scales, or viewed under a too powerful judicial microscope, or construed with sour and overnice precision

and narrowness. The courts should hold up to them the candle of common sense and interpret them with blandness and liberality to support titles long acquiesced in. If such returns comply with the spirit of the statute and are substantially in form, they are well enough: Franse v. Owens, 25 Mo. 329; Ruby v. Railroad, 39 Mo. 480; Littlefield v. Ramsey, 181 Mo. 613, 80 S. W. 949; State v. Still, 11 Mo. App. 285. The return in this case: "and by returning this writ no other property found upon which to levy the writ," is practically a return of nulla bona (the word "other" referring to the garnishment and being without a significance under this record), and the return, judged of by its four corners, showing with reasonable certainty there was no property found whereof to levy the writ.

From these views, it results that conveyance "C" [247] was a valid conveyance and was properly admitted in evidence.

4. It is contended by respondents that even if conveyance "C" be rejected, there remains an outstanding title in Moter under conveyance "B," and hence appellant cannot recover. To meet this contention, appellant insists that the title of Moter under "B" inures to her benefit under "A" on the doctrine of equitable estoppel. In answer to this contention, respondents assert that in ejectment the plaintiff must prove a legal title in order to recover, and that an equitable estate will not be sufficient. In reply, appellant contends that where, as here, the estoppel is used by the plaintiff defensively and not to create a title, such defensive use is allowed in the strict legal action of ejectment.

It is good law that plaintiff must proceed in equity to enforce his equitable rights, and will not be allowed to recover in ejectment on a mere equitable title: Turner v. Baker, 64 Mo. 218, 27 Am. Rep. 226; Clay v. Mayr, 144 Mo. 376, 46 S. W. 157; Kingman & Co. v. Sievers, 143 Mo. 519, 45 S. W. 266; Turner v. Dixon, 150 Mo. 422, 51 S. W. 725; Nalle v. Thompson, 173 Mo. 614, 73 S. W. 599.

It has been said, however, that such condition of things may arise in the trial of an ejectment suit that plaintiff may use equitable estoppel to avoid the force of, or preclude defendant from the benefit of, a given conveyance: Allen v. Sales, 56 Mo. 37; Suddarth v. Robertson, 118 Mo. 295, 24 S. W. 151; Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 337, 17 S. W. 319.

We shall decline to enter the inviting field of judicial exploration presented by the use of the doctrine of estoppel in an action of ejectment where the petition is in common form and the

answer a general denial, and where the decisions are, at first blush, somewhat inharmonious. Because it is self-evident that if conveyance "C" is a valid conveyance, as we have just held, then all questions of equitable estoppel on one [248] hand, and recovery on an equitable title, on the other, become purely academic questions in the case. No one would assert that if Moter got a title on January 16, 1878, under "B" (which stands admitted) and lost it to Betts on September 14, 1878, under "C," as we hold, he could thereafter estop Betts by accepting the proceeds of the second sale in December, 1878, or by causing a second levy on the same land as the land of another, under which plaintiff acquired title, if at all, on October 10, 1878. Betts was no party to the second levy. He was no party to the motion and order of court under which Moter got the proceeds of plaintiff's bid. He had no day in court, and he and those holding through him are not bound by the second levy, sale and deed.

Appellant's third instruction was rightly refused, and so was her first. The judgment is affirmed.

All concur.

The Effect of a Return of an Execution prematurely made is considered in Reed v. Lowe, 163 Mo. 519, 85 Am. St. Rep. 578; and the effect of a failure to make a return on the return day is considered in Rowe v. Hardy, 97 Va. 674, 75 Am. St. Rep. 811. As to the sufficiency of a return nulla bona, see Reed v. Lowe, 163 Mo. 519, 85 Am. St. Rep. 578.

Execution Sales are not scrutinized by the courts with a view to defeat them; on the contrary, every reasonable intendment is made in their favor: Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 818. See, too, Tacoma Grocery Co. v. Draham, 8 Wash. 263, 40 Am. St. Rep. 907; Neal v. Nelson, 117 N. C. 393, 53 Am. St. Rep. 590; Cronkhite v. Buchanan, 59 Kan. 541, 68 Am. St. Rep. 379; Bradley v. Sandilands, 66 Minn. 40, 61 Am. St. Rep. 386. An execution sale which is merely voidable is not subject to collateral attack: Clark v. Glos, 180 Ill. 556, 72 Am. St. Rep. 223; Brown v. Bose, 55 Neb. 200, 70 Am. St. Rep. 379; Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725; but a void sale is vulnerable to such attack: Moody v. Moeller, 72 Tex. 635, 13 Am. St. Rep. 839. See, too, Davis v. Comer, 108 Ga. 117, 75 Am. St. Rep. 33.

WILSON v. FROST.

[186 Mo. 311, 85 S. W. 375.]

LIMITATION OF ACTIONS—Curtesy—Conveyance by Husband.—If a husband has a mere estate by curtesy in lands owned by his wife, and conveys them supposing that he owns them in fee, the statute of limitations does not run against her heirs in favor of the purchaser, although such purchaser has been in possession for twenty-five years. (pp. 621, 622.)

HUSBAND AND WIFE—Conveyances to—Estate by Entirety. A deed conveying an undivided half interest in land to husband and wife respectively does not create a tenancy in common, but an estate of entirety, and upon the death of the wife, the whole estate goes to the husband surviving and his conveyance of his interest carries the whole estate. (p. 622.)

HUSBAND AND WIFE—Conveyances to.—Although husband and wife may take an estate of tenancy in common under the same deed, the intention to create such an estate must be clearly shown by unequivocal words in the deed. (p. 625.)

Hicklin, Leopard & Hicklin and W. M. Williams, for the appellant.

Peery & Lyons and Gillihan & Kerr, for the respondents.

315 VALLIANT, J. This is a suit in ejectment for an undivided half of one hundred and sixty acres of land.

Plaintiff claims under two deeds conveying the whole one hundred and sixty acres to him, one from William Cook and Mary E. Cook, his wife, dated July 26, 1875, the other from William Cook, dated December 9, 1875, after the death of Mary E. Cook.

Defendants are the children and grandchildren of Mary E. Cook, deceased, and claim by inheritance from her.

Plaintiff went into possession of the land in the summer of 1875, under the deed from Cook and wife, and remained in possession until November 12, 1901. William Cook died in 1899, and after his death, the defendants in this suit sued this plaintiff in ejectment and recovered judgment for an undivided half and were put into possession thereof by the sheriff, November 12, 1901, immediately after which this plaintiff brought this suit.

At the trial of this suit, the plaintiff, in the absence of the original deed, read in evidence from a record book in the recorder's office the record copy of the deed of July 25, 1875, from William Cook and Mary E. Cook to himself. On the face of that record it did not appear that there were seals attached to

the grantor's signatures, although the deed was acknowledged in due form and had been on record since October, [316] 1875. The plaintiff's counsel stated that he offered it only as color of title in connection with his claim of adverse possession. The plaintiff relied mainly for his paper title on the deed from William Cook after the death of his wife, dated December 9, 1875.

The plaintiff's contention is that the title to the land was in William Cook and Mary E. Cook, his wife, during their joint lives as an estate of entirety and that on the death of the wife it became the husband's exclusively. If the plaintiff is right in that contention, then the deed from William Cook to him, after the death of Mary Cook, conveyed the whole title and he is entitled to recover.

The defendants contend that Cook and his wife owned each an undivided half of the land as tenants in common; that on her death her undivided half descended to them as her heirs at law, subject to William Cook's life estate by curtesy, which life estate ended at his death in 1899, at which time their right to possession accrued.

The title which Cook and his wife had to the land was derived from a deed from Henry G. Deering and wife to them of date November 13, 1865, and was in these words:

"This indenture made and entered into this the thirteenth day of November in the year of our Lord one thousand eight hundred and sixty-five, between Henry G. Deering and Malinda M. Deering, his wife, of the county of Daviess and state of Missouri of the first part, and William Cook and Mary E. Cook of the county of Daviess and state of Missouri, parties of the second part, that is to say, to the said William Cook the one undivided one-half interest and the said Mary E. Cook the other one undivided half interest in the following described land, witnesseth: That the said party of the first part for and in consideration of the sum of two thousand eight hundred dollars to them in hand paid by the party of the second part, the receipt [317] of which is hereby acknowledged, have granted, bargained and sold and by these presents do grant, bargain and sell the following described land situated in the county of Daviess and state of Missouri: The west one-half of the southwest quarter of the northwest quarter of section five; also the north one-half of the northwest quarter and the north one-half of the northeast quarter of section fourteen, all in township fifty-nine, of range twenty-nine, containing one hundred and eighty acres, as per the government survey, be the same more or less.

"To have and to hold the premises hereby conveyed with all the rights, privileges and appurtenances thereto belonging or in anywise appertaining, unto the said William Cook and Mary E. Cook, their heirs and assigns forever; they, the said Henry G. Deering and Malinda M. Deering, his wife, hereby covenanting to and with the said William Cook and Mary E. Cook, their heirs and assigns, for themselves, their heirs, executors and administrators to warrant and defend the title to the premises hereby conveyed against the claims of every person whomsoever."

It was admitted that defendants were in possession of the undivided half of the land sued for and had been since November 12, 1901, and that the rental value thereof was thirteen dollars a month.

The cause was tried by the court, jury waived, the trial resulted in a finding and judgment for the plaintiff for possession, sixty-five dollars damages, and thirteen dollars monthly rents until possession gained; from which judgments the defendants have appealed.

1. Although the plaintiff was in open possession of the land claiming it as his own from the summer of 1875 until November, 1901, when he was ousted of an undivided half at the suit of these defendants, yet he thereby acquired no title as by adverse possession, because he held possession under William Cook, who, even if he did not own the fee to the whole, as he supposed [318] he did when he made the deed of December 9, 1875, held at least an estate for his own life as tenant by the curtesy, and, therefore, the defendants as heirs of their mother and grandmother were not entitled to possession until the death of William Cook, which occurred in 1899, and the statute of limitations did not begin to run against them until that date.

2. The case turns on the construction to be given the deed from Deering and wife to Cook and wife of date November 13, 1865. If the effect of that deed was to vest in each of the grantees, independently of the other, title in fee to an undivided half of the land as tenants in common, then the plaintiff in this suit acquired under the deed from William Cook, December 9, 1875, title in fee to only an undivided one-half and an estate for the life of the grantor in the other half, and in that view of the case the plaintiff cannot recover. But if the Deering deed conveyed to the grantees as husband and wife an estate of entirety, then on the death of the wife, the husband became the sole owner in fee and his deed vested in the plaintiff title in

fee to the whole and in that view the plaintiff was entitled to recover.

Reference is made in the briefs to section 12, chapter 108, General Statutes of 1865, page 443, which is as follows: "Every interest in real estate granted or devised to two or more persons, other than executors and trustees, or to husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy."

The object of that statute was to give the instrument carrying the title such a construction as would make the estate conveyed a tenancy in common in preference to a joint tenancy unless the intention to create a joint tenancy was too clearly expressed to admit of construction to the contrary. It purports to deal only with tenancies in common and joint tenancies, and [319] makes no distinct reference to estates of entirety. An estate of entirety has its own essential characteristics which distinguish it as well from a joint tenancy as from a tenancy in common. In an estate of entirety, the surviving husband or wife, as the case may be, becomes the sole owner of the property on the death of the other, but not by survivorship, as in case of a joint tenancy. In an estate of the entirety, the husband and the wife during their joint lives each owns, not a part, or a separate or a separable interest, but the whole, and, therefore, the death of one leaves the other still holding the whole title as before, with no one to share it.

The common law theory of unity of husband and wife rendered a joint tenancy even more inapplicable to them than a tenancy in common, because joint tenants derive their title from the same deed, whereas tenants in common may derive theirs from different deeds. Therefore, a deed in such form as by the common law would create a joint tenancy in two grantees, would in the same form create an estate of entirety in husband and wife, who were one person. It is easier to conceive a husband and wife as tenants in common than as joint tenants.

Since, as we have seen, the statute above quoted refers only to joint tenancies and tenancies in common, it is not very clear what effect is to be given to the words "or to husband and wife" in the connection there used. Under that statute, if a deed is made conveying an estate to two or more persons, it is to be construed to create a tenancy in common, unless it expressly says it is intended to create a joint tenancy. That is easily understood in reference to the deed conveying an estate to two or more persons, but suppose it conveys an estate to a husband

and wife and does not expressly say it is intended to create a joint tenancy, what estate does it convey? It must be an estate in entirety. It would seem, therefore, that the words "and husband and wife" were inaptly used in [320] that statute. We have given this consideration to this statute because counsel in their briefs have referred to it, but really the statute in that form was not in force when this Deering deed was made, in November, 1865; the General Statutes of 1865 did not go into effect until August 1, 1866: Gen. Stats. 1865, p. 882. The statute in force when this deed was made was section 13, chapter 32 of the Revised Statutes of 1855, page 357, which is the same as above quoted, except that the words "or to husband and wife" are not in it. Therefore, when this deed was made the common law was the only law on the subject.

On the part of the plaintiff it is contended that at common law husband and wife could not become joint tenants or tenants in common, and that a deed undertaking to create such an estate in them would be construed in spite of its words to create an estate of the entirety.

The authorities cited on both sides of this proposition show that it is a subject on which all the courts in this country are not agreed. Whilst the precise proposition has not been declared in this state, yet there is language in some of our decisions that seem to support the plaintiff's contention: Gibson v. Zimmerman, 12 Mo. 385, 51 Am. Dec. 168; Garner v. Jones, 52 Mo. 71; Shroyer v. Nickell, 55 Mo. 264; Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302; Russell v. Russell, 122 Mo. 236, 43 Am. St. Rep. 581, 26 S. W. 677; Baines v. Bullock, 129 Mo. 117, 31 S. W. 342; Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784; McLeod v. Venable, 163 Mo. 540, 63 S. W. 847.

On the other hand, as will be seen by reference to the cases cited in the brief of appellants, there are courts which hold that a husband and wife may take an estate of tenancy in common under the same deed, when the intention to create such an estate is clearly shown in the deed. According to the cases cited, however, the intention to create such an estate must be unmistakably shown. In the list of those cases is Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. Rep. 125, 32 L. ed. 488, which is a sample of the others, and the facts of which illustrate what is above [321] said. In that case, although the title was conveyed to the husband and wife in one deed, yet each had, prior to the execution of the deed, at a separate time and under a separate bond for title, acquired an undivided half interest

in the land, and the deed was but the confirmation of those separate titles.

Even if it be conceded that at the time this Deering deed was executed it could lawfully have conveyed the property to Cook and wife as tenants in common if it had used clear and unequivocal language to that effect, such concession would not end the case in defendants' favor.

Referring to deed, we see in the first place that it was not drawn by a skillful conveyancer; it does not suggest that the man who wrote it was learned in the technicalities of the law governing estates of the kind under discussion. The words which the defendants rely upon as creating an estate of tenancy in common have no grammatical connection with the other words in the sentence into which they are injected.

They are found in the premises: "This indenture, made and entered into this the thirteenth day of November, in the year of our Lord one thousand eight hundred and sixty-five, between Henry G. Deering and Matilda M. Deering, his wife, of the county of Daviess and state of Missouri of the first part, and William Cook and Mary Cook of the county of Daviess and state of Missouri, parties of the second part, that is to say, to the said William Cook the one undivided half interest, and the said Mary E. Cook the other undivided half interest in the following described land, witnesseth." Then the deed proceeds in due form to recite that in consideration of two thousand eight hundred dollars paid to the parties of the first part by the parties of the second part, the former conveys to the latter the land, describing it, to have and to hold "unto the said William Cook and Mary E. Cook, their heirs and assigns forever." Both 322 in the granting clause and the habendum, the form of the conveyance is simply that of a deed in common-law form without any suggestion of the character of the estate conveyed other than that to be naturally drawn from the words of conveyance.

If the conveyancer knew the difference between a tenancy in common, joint tenancy, and an estate by the entirety, and intended to avoid creating the latter and to create the former, he would have made his intention more clear, but if, as is more probable, judging from his deed, he knew nothing about such estates, then we cannot attribute such a meaning to his otherwise vague, if not altogether meaningless, words inappropriately injected into the premises of the deed.

It is said the words must be given some meaning. That is so, provided it can be done without making for the parties a

contract they did not make for themselves. If the words have any meaning in the connection in which they are placed, they were probably intended to give assurance to the wife that she was to have as much interest in the land as her husband, and in that sense they were true, and in that sense they in no way control or change the common-law effect of the granting clause or of the habendum in the deed. This is the view of the case taken by the learned trial judge, and it is correct.

The judgment is affirmed.

All concur.

Tenancies by the Entirety are discussed in the monographic note to Den ex dem. Hardenbergh v. Hardenbergh, 18 Am. Dec. 377-389. By the common law, such a tenancy is created when the grantees are husband and wife, unless a contrary intent is manifest. This rule, however, has been abrogated in many of the American states: See McLaughlin v. Rice, 185 Mass. 212, 102 Am. St. Rep. 339, and cases cited in the cross-reference note thereto.

STATE v. BROCK.

[186 Mo. 457, 85 S. W. 595.]

CRIMINAL LAW—Information—Signing.—The fact that an information is signed by the initial of the prosecuting attorney's first name, instead of by his first name in full, is a substantial compliance with the statute requiring the information to be signed by the prosecuting attorney. (p. 626.)

SEDUCTION BY MINOR.—A minor capable of seducing and debauching a female may be guilty of seduction under promise of marriage. (pp. 626, 627.)

CRIMINAL LAW—Presence of Accused—Presumption.—If the record shows that the accused was present in court and waived formal arraignment, and that at the close of the evidence for the prosecution he demurred thereto, it must be presumed on appeal that he was present during the whole trial. (p. 628.)

Rechow & Pufahl, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

458 BURGESS, P. J. The defendant was convicted in the circuit court of Polk county, and his punishment fixed at a fine of three hundred dollars and imprisonment for thirty days 459 in the county jail of said county, under an information filed by L. Cunningham, the prosecuting attorney of said county,

with the clerk of the circuit court of said county on the fourth day of August, 1903, charging him with having feloniously, under promise of marriage, seduced and debauched one Iva Fender, an unmarried female of good repute and under twenty-one years of age. Defendant appeals.

Before the trial, the defendant moved to quash the information upon several grounds, the only one of any importance being that while the prosecuting attorney's full name was Lietellus Cunningham, and he was elected to office by that name, the information was signed, "L. Cunningham," prosecuting attorney. The motion was overruled, and defendant excepted.

The contention of defendant is that as the statute (Rev. Stats. 1899, sec. 2477) requires that an information must be signed by the prosecuting attorney, it means in the name of the person elected or appointed to that office, that is, in his official capacity and under the name by which he was elected, commissioned and qualified. It seems to us that a strict compliance with the letter of the statute should not be required, but that a substantial compliance with it is all that is necessary. The object of the statute in this regard is that the accused and court may know who makes the charge and whether or not by the proper officer. The court is, of course, bound to take notice of its own officers, and that the information is presented in the name of the prosecuting attorney of the county. The record in this case recites that on the twenty-ninth day of June, 1904, there was filed in the office of the clerk of the circuit court of Polk county an information by the prosecuting attorney of said county, and then proceeds to set out the information which begins as follows: "L. Cunningham, prosecuting attorney, within and for the county of Polk," etc. The failure of the prosecuting attorney to write his full name in the body of the information, or to sign [460] it in that way at its conclusion could not possibly have misled the defendant or prejudiced his rights upon the merits of the case: Rev. Stats. 1899, sec. 2533; State v. Kinney, 81 Mo. 101; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. The motion to quash was properly overruled.

The point is made that at the time of the alleged contract of marriage the defendant was under age, and incapable of entering into a valid contract of that character, and that, therefore, he was not guilty and could not have been guilty of the crime of seducing and debauching prosecuting witness under promise of marriage. But we are unable to appreciate the force of this contention. The statute (Rev. Stats. 1899, sec. 1844)

is leveled at any person who shall, under or by promise of marriage, seduce or debauch any unmarried female of good repute and under twenty-one years of age, thus ignoring entirely the question of his age, and clearly the question of such a person to make a valid contract of marriage is foreign to any issue in the case. Any person capable of seducing and debauching a female can make a promise of marriage, whatever his age may be, and it is sufficient that he make such a promise, and in consequence of it commits the crime. It is idle to say that the defendant was not capable of making such a promise at the time alleged in the information, and although he may not have been competent, because of his minority, to make a valid contract, such a one as he could have been compelled by legal proceeding to comply with, or to respond in damages for its violation, it would be strange indeed if a person could in this way violate both law and morals and not be held amenable to the law, but shield himself upon the ground that he was not capable of making a valid contract. Such is not the law.

In behalf of the state the court gave the usual instruction upon the question of the flight of defendant for the purpose of avoiding arrest for the crime with which he is charged, which it is earnestly insisted was [461] unauthorized by the evidence and should not have been given. But we are unable to concur in this position. On the contrary, we think the evidence, without repeating it, well warranted the instruction; hence, it was not erroneous.

A final contention is that the record fails to show that the defendant was personally present during the trial as required by section 2610 of the Revised Statutes of 1899, and that, because of its failure to do so, the judgment must be reversed. But this position does not seem to be borne out by the record, which shows that on the twenty-third day of November, 1903, the same being the third judicial day of the term, the defendant was duly arraigned and pleaded not guilty to the information, and for his trial puts himself on the county. And thereafter, on the same day and in the same cause, the record recites, "Comes now the defendant herein by his attorneys, and by leave of court and at the close of plaintiff's evidence files his demurrer to the evidence herein.

"And said demurrer to plaintiff's evidence is in words and figures as follows, to wit:

"Now comes the defendant herein at the close of the evidence offered by the state, and demurs to said evidence and asks the

court to instruct the jury to return a verdict of not guilty for the following reasons: . . . .

"Signed: RECHOW & PUFAHL and
"C. H. SKINKER,
"Attorneys for Defendant."

These entries show: 1. That defendant was present in court and waived formal arraignment to the information; 2. That defendant, by his attorneys and by leave of court at the close of plaintiff's evidence, filed his demurrer to the evidence; 3. That the defendant, at the close of the state's evidence, demurred thereto for grounds set forth in the motion. It is true [462] the demurrer under consideration was signed by defendant's attorneys, but this is not inconsistent with the recital in the motion, "Now comes the defendant herein," which shows that the defendant was then present in court; otherwise it in all probability would have said, "Now comes the defendant herein by his attorneys," etc. We do not refer to the order of arraignment as showing that defendant was in court and present during the trial, but rather as a prelude to the orders which follow, and which, as intimated, show that defendant was present during the trial and especially at the time he demurred to the evidence adduced by the state. And being present at that "stage of the trial, it shall be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial": Rev. Stats. 1899, sec. 2610.

For the reasons stated, we are of the opinion that the judgment should be affirmed. It is so ordered.

All concur.

An Infant who has not reached the age when he can make a valid contract of marriage may be guilty of seduction: People v. Kehoe, 69 Am. St. Rep. 52; note to Bradshaw v. Jones, 76 Am. St. Rep. 675.

STARK v. KIRCHGRABER.

[186 Mo. 633, 85 S. W. 868.]

HUSBAND AND WIFE—Conveyance Directly to Wife.—A conveyance of land by a husband directly to his wife vests the equitable title in her while the legal title remains in him as trustee for her, but upon her death the trusteeship ceases and the whole title vests in her heirs, depriving the husband of the right thereafter to convey any title to the land. (pp. 635, 636.)

ESTATES OF DECEDENTS—Sale of Land.—A statute providing that a person interested in the estate of a deceased person may apply for the sale of the real estate of the decedent applies only to such persons as are entitled to a distributive share in such estate. Hence one who has bought the interest of an heir in such estate has no right to make such application and a sale thereon is void. (pp. 636, 637.)

ESTATES OF DECEDENTS.—Land on the death of an intestate descends directly to his heirs, and is no part of the estate which goes into the hands of the administrator for distribution, except when necessary to sell it to pay decedent's debts. (p. 637.)

ESTATES OF DECEDENTS—Sale of Land—Collateral Attack.—Although a judgment of a probate court ordering the sale of real estate cannot be collaterally attacked if the court had jurisdiction, yet the whole record may be introduced to show that the court had no jurisdiction to entertain the application for the sale or to make the order therefor, and that, for that reason, its judgment was void. (p. 638.)

ESTATES OF DECEDENTS—Sale of Real Estate—Jurisdiction.—An order of court to sell the real estate of a decedent made on the application of one who has no interest in such estate is without jurisdiction and void. (p. 638.)

Wright Brothers & Blair, for the appellant.

O. T. Hamlin, for the respondent.

635 FOX, J. This cause is here upon appeal from the Greene county circuit court.

On the twenty-fourth day of February, A. D. 1901, the respondents, as plaintiffs, filed in the circuit court of Greene county their petition in the above-entitled cause, which said petition, omitting caption and style of case, is as follows:

636 "Come now the plaintiffs and say that they are the children of Sandy and Hulda Jarrett, deceased, and that at the time of the death of the said Hulda Jarrett she was the owner in fee simple of four acres of land off of the west end of the north half of the northwest fractional quarter of section 7, township 29, and range 21, said four acres being on the south

side of the one-acre tract sold to Robert Stokes, and recorded in book 67, at page 4775, and lying and being in Greene county, Missouri.

"And they further state that each owns at this time one-sixth interest in said land, by virtue of being the heirs at law of Hulda Jarrett, deceased; they further state they are informed and believe the defendant claims some interest in said land.

"They pray the court to ascertain and determine the estate, title and interest of said party, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties in said property."

To this petition the following answer was filed:

"Now comes the defendant in the above-styled cause and by leave of court, for her amended answer to plaintiffs' petition, admits that she claims an interest in the land therein described, to wit: The fee simple title, and further avers and states that she is the owner of the fee simple title in said land; that she is in possession thereof, and denies each and every other allegation therein contained."

Upon the trial of this cause it was admitted that Sandy Jarrett was the common source of title. The facts, as shown by the testimony, including the documentary evidence introduced, are as follows:

"Sandy and Hulda Jarrett were husband and wife. Prior to February 21, 1888, Sandy had acquired the fee simple title to the land described in the petition, and on said date he signed and acknowledged a deed purporting on its face to convey said land to his wife [637] Hulda. Hulda died October 2, 1890, leaving her husband, Sandy, and six children, to wit, E. W. (Elias) Jarrett, Ona McCullah, Henry Jarrett, Ida Frost, Maud Stark and Grace Jarrett. The last named is not a party to this action. Sandy died November 3, 1900. On April 27, 1893, E. W. (Elias) Jarrett executed a deed conveying to S. C. Haseltine his interest in said land. On September 28, 1893, Sandy Jarrett, with S. C. and Emma L. Haseltine, executed a warranty deed conveying said land to L. K. Haseltine. On September 17, 1896, L. K. Haseltine conveyed his interest, which included the interests of Sandy and E. W. Jarrett in said land, to Joseph Kirchgraber. Ona McCullah executed a deed of trust on said land, and thereafter the same was foreclosed, and on October 16, 1896, a trustee's deed was executed conveying the interest of Ona McCullah to Joseph Kirchgraber. There-

after Joseph Kirchgraber died leaving said land to his widow, Lizzie Kirchgraber, the defendant."

The record is silent as to the date of grant of letters of administration on the estate of Hulda Jarrett, deceased; but it does appear that W. H. Pipkin was the former administrator of said estate, and turned over twenty-seven dollars and seventy-five cents to said Jarrett, husband of the deceased, by order of the probate court. This was the last heard of that administration, so far as the record discloses, until this appellant, who is neither an heir nor a creditor of said estate, commenced the proceedings in the probate court to sell the real estate.

The first step taken in the probate court to sell this real estate was by this appellant; she gave the following notice to the administrator of the estate of Hulda Jarrett, deceased:

"To A. N. Foss, Administrator of the Estate of Huldy Jarrett, Deceased:

"You are hereby notified that [638] on April 20, 1897, I will file a motion in the probate court in and for Greene county, Missouri, asking to sell at public auction the following described real estate, to wit: Four acres of land off of the west end of the following described land, to wit: Four acres on the west end of the north half of the northwest fractional quarter of section 7, township 29, range 21, Greene county, Missouri. Said four acres being on the south side of the one acre sold to Robert Stokes, and recorded in book 67, page 495, in the recorder's office in Greene county, Missouri."

After the service of such notice upon the administrator, the appellant in this cause presented to the probate court the following petition:

"In the Matter of the Estate of Hulda Jarrett, Deceased. A. N. Foss, Administrator.

"Now comes Lizzie Kirchgraber, an interested party in the estate of the said Hulda Jarrett, deceased, and prays the honorable probate court of said county to order a sale of the real estate of the said Hulda Jarrett, deceased, at public auction, and states to the court that the administrator has sold the personal estate of the deceased as appears by the sale bill already filed, and of said personal estate, goods and chattels and payment of debts for said estate as follows, to wit, sufficient to pay the debts of the deceased without selling the whole, the real estate mentioned, as follows: Four acres of land off of the west end of the following described land, to wit: Four acres on the west end of the north half of the northwest fractional quarter of

section 7, township 29, range 21, Greene county, Missouri, said four acres being on the south side of the one acre sold to Robert Stokes. Recorded in book 67, page 495.

"It is further stated by said Lizzie Kirchgraber that there is a large amount of taxes due on said land and has been sued for, and further that the estate has been in the hands of the public administrator for more [639] than five years, and should be settled up, and she recommends that the same be sold for the payment of the debts due by the deceased, or so much of said real estate as may be sufficient for that purpose, at public auction."

Upon the foregoing petition the probate court made the following order:

"In the Probate Court within and for Greene County, Missouri, May Term, 1897. A. N. Foss in Charge, Administrator of the Estate of Hulda Jarrett, Deceased.

"Now on this day comes Lizzie Kirchgraber, an interested party in the estate of Hulda Jarrett, deceased, and presents to the court her petition praying for an order for the sale of so much of the real estate of said deceased at public auction, as will pay and satisfy the remaining debts due by said estate and yet unpaid for want of sufficient assets, accompanied by the accounts, lists and inventories required by law in such cases. On examination thereof it is ordered that all persons interested in the estate of said deceased be notified that application as aforesaid has been made, and that unless the contrary be shown on or before the first day of the next term of this court, to be held on the second Monday of August next, an order will be made for sale of the whole, or so much of the real estate of said deceased at public auction as will be sufficient for the payment of said debts, and it is further ordered that this notice be published in some newspaper in this county for four weeks before the next term of this court. And the court finding that Hulda Jarrett, Maud Jarrett, Ida Jarrett, Grace Jarrett, Elias W. Jarrett and Mary O. McCullah are heirs of the estate of said deceased, and that they are residents of this county, orders that they each be served with a copy of this notice at least ten days before said next term of this court."

The administrator, upon being notified that appellant [640] would make application to the probate court for the sale of this land in pursuance of section 151 of the Revised Statutes of 1899, filed with the clerk of the court accounts, lists, and inventories, as provided by that section, and the order of sale was made upon the application of the appellant, in pursuance of

the provisions of section 150 of the Revised Statutes of 1899, and the land was sold and the appellant became the purchaser. Report of sale was made and approved, and a deed executed by the administrator to the appellant for the land in dispute.

Upon the introduction of the administrator's deed in evidence, plaintiffs introduced the entire record of the probate court in respect to such sale.

Upon the submission of the cause to the court, it made the following finding of facts, upon which a judgment and decree was rendered in accordance with such finding:

"The court finds that in 1882 Sandy Jarrett acquired by deed the title to forty acres of land, of which the four acres in controversy was a part; that in 1888 he deeded to his then wife, Hulda Jarrett, the four acres in controversy by deed direct from himself to her, properly acknowledged and recorded. This deed was the ordinary general warranty deed. In 1890 Hulda Jarrett died, leaving surviving her her husband, Sandy Jarrett, and her children and only heirs at law, Maud L. Stark, Ida Frost, Henry Jarrett, Grace Jarrett, E. W. Jarrett and Ona McCullah, the first three of whom are plaintiffs in this action. In 1892, E. W. Jarrett and Ona McCullah, by proper deed of trust, conveyed their interest in the property to one Haseltine, and by subsequent proceedings their title was vested in the defendant, Lizzie Kirchgraber. So far as this record shows, Grace Jarrett has never made any conveyance of her interest in the property and is not a party to this suit. In 1898 Sandy Jarrett attempted to convey the fee to his interest in the property [641] to one Haseltine by general warranty deed, which title was afterward vested in the defendant, Lizzie Kirchgraber. Sandy Jarrett afterward, in November, 1900, died without having remarried, and having no children except those by his former wife, Hulda Jarrett. The court holds the law to be that by the deed of Sandy Jarrett to his wife in 1888 she became vested with an equitable separate estate and the legal estate remaining in him as trustee for her; that by her death the title to said equitable estate vested in her children a one-sixth interest in each, subject to the curtesy right of her husband surviving her, and that by his death the said curtesy right was extinguished, and that these plaintiffs are each entitled to an undivided one-sixth interest in the equitable separate estate of their mother, the legal estate being in Lizzie Kirchgraber. The court adjudges and declares the law to be that by these proceedings the said legal estate is devested out of the defendant Lizzie Kirchgraber, and a one-

sixth interest is vested in each of the heirs of said Hulda Jarrett, and judgment is accordingly rendered. The court further finds that Lizzie Kirchgraber in 1897 filed a petition in the probate court asking that the property in controversy be sold. The court finds that she was not a creditor nor entitled to participate in distribution of the estate on its final wind-up, but her only interest in the estate was the interest she had acquired of the two heirs, E. W. Jarrett and Ona McCullah. The court finds that the petition, the notice, and the order were not sufficient to warrant sale of the real estate, and that the sale under it conveys no title and was utterly and absolutely void and left these plaintiffs unaffected in their interest to the property. The court finds that the defendant, Lizzie Kirchgraber, has paid taxes on the land in controversy, but leaves that question open until a partition proceeding may be had between the parties."

642 From this judgment defendant prosecuted her appeal, and the cause is now here for review.

Upon the first proposition presented by this record as to the nature and character of the estate conveyed by the deed of Sandy Jarrett, dated February 21, 1888, to his wife, Hulda Jarrett, the law is well settled in this state.

That this deed created in Hulda Jarrett, wife of Sandy Jarrett, a separate estate in equity in this land is no longer an open question in view of the repeated and uniform expressions of opinion by this court upon that subject: Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897; Small v. Field, 102 Mo. 104, 14 S. W. 815; Crawford v. Whitmore, 120 Mo. 144, 25 S. W. 365; Pitts v. Sheriff, 108 Mo. 110, 18 S. W. 1071.

Upon the execution of that deed to his wife, she acquired, by such conveyance, the equitable estate in the lands conveyed, and Sandy Jarrett, the husband, retained the legal estate in trust for his wife.

Sandy Jarrett, the husband of Hulda Jarrett, occupied the position in respect to this land as trustee of his wife by construction of the law simply because he was her husband. and when the marriage relation was at an end the trust relation ceased, and this use was executed by operation of law. In Roberts v. Moseley, 51 Mo. 282, this court said: "Where a trustee is appointed to hold the estate of a married woman, to protect it from the husband, and the marriage relation comes to an end, his estate at once becomes executed in the person who is to take it, the wife, if living, or, if she is dead, her heirs at law."

This court, by Gantt, J., in Pitts v. Sheriff, 108 Mo. 116, 18 S. W. 1072, approved the rule announced in the quotation from the Roberts-Moseley case, and in the discussion of the doctrine approved, said: [643] "When the conditions under which the trust or use ceased, the seisin and possession were transferred by operation of law to the beneficiary. If the law would effect the transfer where a third party was trustee, when the marriage relation came to an end, upon what principle would it hesitate to execute the use in the wife when the conveyance was directly in her? We can find none. Accordingly, we hold that when the court found the deed was delivered to Mrs. Pitts, and that she was subsequently divorced, then the law executed the use in her, and transferred to her the legal as well as the equitable title: 2 Washburn on Real Property, 3d ed., 461, sec. 45; Liptrot v. Holmes, 1 Ga. 381; Morgan v. Moore, 3 Gray, 323; Steacy v. Rice, 27 Pa. St. 75, 67 Am. Dec. 447; Bush's Appeal, 33 Pa. St. 85.

"By operation of our statute of 'uses and trusts,' section 8833 (Rev. Stats. 1889), the wife, when she became discovert, was seised of the legal as well as the equitable estate, 'to all intents, constructions and purposes in law,' as fully as if the husband, the plaintiff, had made a formal conveyance to her after the divorce.

"The rule is well settled, both in England and in this country, that when an estate is devised to trustees for a particular purpose, the legal estate rests in them as long as the execution of the trust requires it, and no longer: Steacy v. Rice, 27 Pa. St. 75, 67 Am. Dec. 447; Ross v. Parker, 1 Barn. & C. 360; Mark v. Mark, 9 Watts, 410. Here, the husband was by construction of law trustee of his wife, simply because he was her husband. When the marriage ceased, the trust ceased, and the use was executed." It is clear from the principles announced in this case (and it has never been departed from) that upon the death of Hulda Jarrett, wife of "Sandy," the marriage relation was at an end, and it is equally apparent that upon her death the trusteeship of her husband ceased, and that the estate held in trust by the husband, upon the dissolution of the marriage relation, at once became [644] executed in the persons who were to take it, who, in this case, were the children of Hulda Jarrett, deceased. This being true, upon the death of Hulda Jarrett, by operation of law, Sandy Jarrett, the husband, was devested of the legal estate; hence his deed in 1893 to L. K. Haseltine did not convey such estate in this land, and therefore

the appellant, by her deed from Haseltine, did not acquire the legal estate to the land in dispute.

The conclusion of the trial court, upon this proposition, in which it is stated that the legal estate was vested in Lizzie Kirchgraber, the appellant, was erroneous.

It is unnecessary to refer to any interest in the estate, which the husband may have held, upon the death of the wife by the curtesy; if there was any such estate, it was extinguished by his death in 1900.

This leads us to the only remaining proposition involved in this cause; that is, upon the record, as made by the probate court, was the sale made by the administrator of the estate of Hulda Jarrett, deceased, of the land in dispute a valid one, and did his deed under such sale convey to Lizzie Kirchgraber, the appellant in this cause, the legal title to the premises? A correct answer to this question must be the solution of this proposition. That the order of sale, and the sale made in obedience to it, was made upon the application of the appellant in this cause, under the provisions of section 150, supra, there can be no dispute. The entire record demonstrates that fact.

Section 150 provides: "If such executor or administrator do not make such application, any creditor or other person interested in the estate may make such application, giving twenty days' notice to the executor or administrator. On such application the court shall order publication and notice, as provided in preceding sections."

It is obvious from that section that the authority [645] to make the application for the sale of land of a deceased person is limited to a "creditor or other person interested in the estate." It is equally clear that the terms "other person interested in the estate" contemplates persons who have an interest in the distribution of the estate, or who have a right to participate in such distribution, such as an heir, or one who is made a legatee by will, or the guardian or curator of one of the heirs of the estate, or other persons who may be entitled to a distributive share of the estate. That the appellant in this case had no such interest in the estate of Hulda Jarrett, deceased, as authorized her to make that application for the sale of the real estate, in our opinion, is too plain for discussion. Her purchase of the interest of the two children of the deceased in the land which descended to them falls far short of creating any interest in the estate, as contemplated by the section of the statute, upon which the proceedings to sell the land were predicated.

Upon the death of a party who dies intestate, his or her lands descend directly to the heirs, and, technically, are no part of the estate which goes into the hands of the administrator for distribution, and in the administration of the estate the administrator has nothing to do with such lands, except as it may be subjected to his control under the provisions of law, which subject lands to the payment of the debts of the deceased.

If the appellant does not fall within the terms "other persons interested in the estate," then it follows that the order of sale by the probate court was without authority and is void. But it is insisted by appellant that the order of sale, and the sale made in obedience to it, and its approval by the court, was a final judgment, and cannot be attacked in this collateral proceeding. This is true where the record upon its face shows that the court had jurisdiction.

"Jurisdiction may be defined to be the right to [646] adjudicate concerning the subject matter in a given case. To constitute this there are three essentials: 1. The court must have cognizance of the class of cases to which the one to be adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be, in substance and effect, within the issue": Munday v. Vail, 34 N. J. L. 422.

It was legitimate and competent for the plaintiffs in this case to introduce the entire record of the probate court in the proceedings to sell this land. An examination of that record convinces us that one of the essentials necessary to confer jurisdiction upon that court was entirely absent. In other words, the proper parties were not before the court, and this is shown upon the face of the record in this, that the appellant, who instituted the proceeding for the sale of the land, was neither a creditor nor was she interested in the estate, within the provisions of the statute.

That want of jurisdiction may be ascertained by the consideration of the whole record was clearly settled by this court in Hutchinson v. Shelley, 133 Mo. 400, 34 S. W. 838. In the discussion in that case of the same contention that is now urged in the case at bar, the court said: "But it is urged by counsel for defendant that the judgments and orders of probate courts in the administration of estates are accorded the same presumptions in favor of their regularity as are indulged in favor of courts of general jurisdiction, and they are correct in this assumption: Camden v. Plain, 91 Mo. 117, 4 S. W. 86; Price v. Springfield Real Estate Assn., 101 Mo. 107, 20 Am. St. Rep.

595, 14 S. W. 57; Rowden v. Brown, 91 Mo. 429, 4 S. W. 129, and cases cited. But the judgments of the circuit courts and other courts of general jurisdiction may be overthrown by other portions of their records of equal dignity and importing the same verity which demonstrates that their recitals in their judgments are untrue, and a party attacking a judgment of such a court collaterally may introduce [647] the whole record in the given cause to show that the court had no jurisdiction, either over the person or subject matter, and when it so appears its judgment is void: Cloud v. Pierce City, 86 Mo. 357; Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711." It appearing upon the face of the record that the probate court did not have the authority to entertain the proceeding instituted by appellant for the sale of this land nor to make the order of sale, it follows that the sale made in obedience to such order, as well as the deed executed to defendant in pursuance to such sale, were void and conveyed no title to the land in dispute.

It is insisted by appellant that the trial court was not authorized in this proceeding to render the decree and judgment, for the reason that upon the findings of the court it had no power under the statute upon which this suit is predicated to devest title. In other words, it is contended that the power of the court is limited by the provisions of section 650 of the Revised Statutes of 1899, to the ascertainment and defining of the title of the respective parties to the action. The trial court may have proceeded upon the theory, as indicated in its conclusion, that the legal estate was vested in the appellant by the deed of Sandy Jarrett in 1893, after the death of his wife, and that the decree should devest appellant of such legal estate and vest it in plaintiffs. Such, however, was not the effect of the decree and judgment, for, as is herein determined, appellant did not acquire any legal estate by virtue of said deed for the reason that at the time of the execution of the deed the marriage relation no longer existed, after the death of the wife, to whom the husband had conveyed this land. The husband was, by operation of law, devested of the legal estate, which he held in trust by virtue of the existence of the marriage relation, and the same was vested in the children of his deceased wife, Hulda Jarrett.

We are dealing, upon this appeal, with the result [648] of the decree and judgment, and not any particular theory of the trial judge in reaching such result.

This renders unnecessary any discussion of the scope of the section of the statute upon which this action is based, or the extent of the relief which may be afforded by its provisions. The judgment and decree in this cause were right, under the law applicable to the facts disclosed by the record, and should be affirmed, and it is so ordered.

All concur.

A Conveyance from a Husband to his wife gives her an equitable estate, according to Ogden v. Ogden, 60 Ark. 70, 46 Am. St. Rep. 151, while the legal title remains in him as her trustee. See, too, Wallace v. Pereles, 109 Wis. 316, 83 Am. St. Rep. 898; Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319.

The Orders and Judgments of Probate Courts are generally regarded as entitled to the same favorable presumptions and immunity from collateral attack as are those of courts of general jurisdiction: Stucky v. Watkins, 112 Ga. 268, 81 Am. St. Rep. 47, and cases cited in the cross-reference note thereto. But a judgment of any court, rendered without jurisdiction, is void and vulnerable to collateral attack: Thornily v. Prentice, 121 Iowa, 89, 100 Am. St. Rep. 317; Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299; In re Christensen, 17 Utah, 412, 70 Am. St. Rep. 794.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

KNICKERBOCKER TRUST COMPANY v. PENN CORDAGE COMPANY.

[66 N. J. Eq. 305, 58 Atl. 409.]

FIXTURES—What are.—When Chattels have been placed in and annexed to a building by their owner as a part of the means by which to carry out the purposes for which it was erected, or to which it has been adapted, with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, fixtures, and as much a part of the realty as the building itself, notwithstanding they may be removed from the building without injury to them or it and advantageously used elsewhere, and notwithstanding the building may readily be devoted thereafter to a use entirely different from that contemplated when the annexation was made. (p. 643.)

RECORDS.—A Mortgage Covering Both Real and Personal Property must, to make it a valid lien as against creditors under the New Jersey statutes, be recorded not only among the records of real estate mortgages, but also in one of the books provided for the recording of chattel mortgages, except where the mortgagor is a railroad company. (p. 645.)

RECORDS.—Actual Transcription of a Chattel Mortgage in the records is necessary, under the New Jersey statutes, to make it valid as against creditors. (p. 645.)

RECORDS—When Registration Complete.—As soon as a chattel mortgage is deposited for record, it must be presumed to have been transcribed forthwith, and that presumption continues so long as the instrument remains in the clerk's office and until actually transcribed, after which it becomes conclusive; but when the mortgage is taken away from the office without having been recorded, the presumption ceases to exist, and the instrument stands in the same condition, so far as creditors are concerned, as if it had never been lodged for record. (p. 646.)

John B. Humphreys and Davies, Stone & Auerbach, for the appellant.

James E. Howell, Joseph H. Gaskill and Charles V. D. Joline for the respondents.

[306] GUMMERE, C. J. The bill in this case was filed to foreclose a mortgage executed by the Penn Cordage Company to the appellant, the Knickerbocker Trust Company, on the first day of February, 1896, to secure the payment of an issue of bonds aggregating one hundred thousand dollars. This mortgage covered certain lands and premises belonging to the cordage company, situate in Burlington county, with the improvements thereon, the franchises of the company, and all the goods and chattels belonging to it and being in use about the said lands and premises. At the time of its execution a prior mortgage, covering the same property, held by one Adolph Segal, and which had been recorded in the clerk's office of Burlington county, both as a real estate mortgage and as a chattel mortgage, [307] was paid off. On the 20th of February, 1896, the appellant mailed to the clerk of Burlington county both its own mortgage and also a discharge of the Segal mortgage, with a letter of instructions directing him to satisfy the latter mortgage of record and to "simultaneously record in your office the enclosed mortgage covering the same property." Upon the receipt of this letter, with its inclosures, the clerk canceled the Segal mortgage in both the real estate mortgage book and the chattel mortgage book. At the same time he recorded the appellant's mortgage in the book kept for the recording of real estate mortgages, but not in that kept for recording chattel mortgages, and, after so recording it, he returned it to the appellant.

The Penn Cordage Company became insolvent in 1897, and a receiver was appointed on December 6th of that year. The bill of complaint was filed in February, 1900.

The property embraced in the appellant's mortgage is the cordage works of the Penn Cordage Company, comprising numerous buildings, including a rope-walk, together with the machinery, tools and appliances used therein. The contest is between the appellant, as mortgagee, and the receiver of the cordage company, representing judgment and other creditors. Two questions are presented—first, whether certain of the machinery and appliances contained in the company's buildings and used in the manufacture of its product are fixtures, and, consequently, a part of the realty; and, if they are not fixtures, then, second, whether the appellant's mortgage became recorded as a chattel mortgage, within the meaning of the chattel mort-

gage act, by being lodged with the county clerk for that purpose, although it was subsequently returned to the mortgagee without being in fact so recorded.

The learned vice-chancellor before whom the case was tried held that the machinery and appliances which are the subject matter of this controversy were not fixtures. He further held that the mortgage had not been recorded as a chattel mortgage, and was therefore void as against creditors, so far as the chattels covered by it were concerned. The soundness of each of these conclusions is challenged by the appellant.

308 As has already been stated, the machinery and appliances which are the subject of this litigation were contained in the buildings of the Penn Cordage Company, and were used in the manufacture of its product. They consisted of a scutcher, a lapper, two breakers, three coarse spreaders, four fine spreaders, two drawing frames, eight finishers, a large number of double jennys, nine single and double twisters, two marline machines, three house-line machines, ten double-ballers, a number of strapping reel bars, several rope machines, one double and one single Boone layer, one cone former, two lathes, two drills, one shaper, one oil pump, one grindstone, one emery grinder, one picker, one porgy spinner, eight forming and laying jacks, four reeling machines, one strapping reel stand, one yarn testing reel, one belt driver, one reverse reel, one porgy jenny, one bobbin reel, one platform scale on wheels, a number of windlasses, several reel flyers and all the belting used in the various buildings which was less than six inches in width. All of these machines, with the exception of the porgy jenny, the platform scale, the windlasses and the reel flyers, were a necessary part of the company's plant. Most of them were fastened to the floors of the various buildings in which they were located by lag screws. Those which were not so fastened were attached to the buildings by some other method. The belting ran from the various machines to the shafting, supplying them with power. Two of the requisites necessary to constitute these machines and appliances fixtures, therefore, existed, viz., their actual annexation to the freehold and their application to the use or purpose to which that part of the realty with which they were connected was appropriated. The question remains whether they were annexed with the intention of making a permanent accession to the freehold.

In the earlier cases, decided not only in the supreme court and the court of chancery, but also in this court, in determin-

ing whether such intention existed with respect to a given machine, the conclusion seems to have been rested very largely upon the method adopted in making the annexation, and but little consideration given to the relation which the machine bore to the [309] building in which it was located, or to the other machinery in conjunction with which it was used. In Feder v. Van Winkle, 53 N. J. Eq. 370, 51 Am. St. Rep. 628, 33 Atl. 399, this court took a more comprehensive view of the subject than had been done in the earlier cases, and gave controlling weight to the object for which, rather than to the method by which, the annexation was made, and declared that the physical annexation to the freehold of machinery that was so fitted for and applied to the use to which the realty was appropriated that the machinery and buildings became unified and incorporated together, as a whole, for the prosecution of a common purpose for an indefinite period (i. e., so long as the business engaged in should be carried on successfully), indicated that such machinery was designed to be, not a temporary, but a permanent, accession to the freehold. In the later case of Temple Co. v. Penn Mutual Life Ins. Co., 69 N. J. L. 36, 54 Atl. 295, decided by the supreme court at the February term, 1903, the same learned jurist who wrote the opinion in Feder v. Van Winkle, 53 N. J. Eq. 370, 51 Am. St. Rep. 628, 33 Atl. 399, in discussing the question whether certain chattels which had been placed in a building designed for and used as a theater (and, of course, annexed thereto) were fixtures, declared that "whatever was incorporated with the building to fit it for use as a theater became part of the realty."

The rule laid down in Feder v. Van Winkle, and followed in Temple Co. v. Penn Mutual Life Ins. Co., states the true principle to be applied in the determination of the question when it is presented. Whenever chattels have been placed in, and annexed to, a building by their owner as a part of the means by which to carry out the purposes for which the building was erected, or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, fixtures and as much a part of the realty as the building itself. And this is true notwithstanding that such chattels may be severed from, and taken out of, the building in which they are located without doing any injury either to them or to it and advantageously used elsewhere, and notwithstanding that the building itself may thereafter readily be de-

voted to [310] a use entirely different from that which was contemplated when the annexation was made.

Tested by this principle, the machinery and appliances which are the subject matter of this controversy, with the exception of the porgy jenny, the platform scale, the windlass and the reel flyers (which are none of them annexed to the buildings in which they are located), are fixtures and subject to the lien of the appellant's mortgage as part of the real estate embraced therein.

As the excepted articles are not a part of the realty, it is necessary to consider and determine the second question decided by the vice-chancellor, namely, whether the appellant's mortgage is valid as a chattel mortgage against the creditors of the mortgagor, notwithstanding the fact that it was recorded only among the records of real estate mortgages and not in the book provided for the recording of chattel mortgages.

The provisions of our chattel mortgage act bearing upon this question are contained in sections 4, 5, 7 and 9: Gen. Stats., 2113. Section 4 provides as follows: "That every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against the subsequent purchasers and mortgagees in good faith, unless the mortgage . . . . be recorded as directed in the succeeding section of this act; provided, that nothing contained in this act shall be taken, construed or held to apply to any mortgage of personal property included in a mortgage of franchises and real estate heretofore or hereafter made by any railroad company, and which hath been or shall be recorded or registered as a mortgage of real estate in every county in which such railroad, or any part of it, is or shall be located, and it shall not be necessary to record as a chattel mortgage any such mortgage as is in this proviso described."

Section 5 requires the instruments mentioned in the preceding section to be recorded in the office of the register (or in the office of the clerk where there is no register) of the county where the mortgagor resides, if he is a resident of the state at the time of its execution; and if not, then in the office of the register (or clerk) of the county in which the mortgaged [311] property shall be at the time of the execution of the instrument. Section 7 provides as follows: "That the clerks and

registers of the several counties of this state are hereby authorized to provide suitable books, at the expense of their respective counties, in which to record the instruments by this act directed to be recorded; and it shall be the duty of the said clerks and registers to record such instruments in accordance with the provisions of this act; and the said clerks and registers shall respectively enter, at the foot of the record of each mortgage and instrument so recorded, the time when such mortgage or instrument was received by him in his office to be recorded, and shall endorse on each mortgage and instrument, when recorded as aforesaid, the time when the same was delivered to him at his office to be recorded, and the book and page in which the same has been recorded."

Section 9 provides "that every chattel mortgage hereafter recorded pursuant to the provisions of this act shall be valid as against the creditors of the mortgagor, and against subsequent purchasers and mortgagees, from the time of the recording thereof until the same be canceled of record."

The contention first advanced on behalf of the appellant is that the recording of its mortgage among the records of real estate mortgages was a sufficient compliance with the provisions of the chattel mortgage act. It is not necessary to repeat the argument made in support of this contention. It is enough to say that the proviso, contained in section 4 of the act, makes it plain that, with the exception of the class of mortgages designated therein, every mortgage which covers both real and personal property must, in order to make it a valid lien upon both classes of property as against creditors, be recorded not only among the records of real estate mortgages, but also in one of the books which the statute under consideration requires to be provided for the recording of chattel mortgages.

The solution of the question must depend upon whether the lodging of the appellant's mortgage for record as a mortgage of chattels (for this we consider to have been the effect of the letter of instructions sent by the appellant to the clerk with [312] its mortgage) was, within the meaning of the statute, a recording of that instrument, notwithstanding that it was never in fact transcribed in the official book provided for the purpose. It was held by the learned vice-chancellor, in the court below, that a transcription of the mortgage in the chattel mortgage book was necessary in order to make it valid as against creditors. In this view we concur. The statute, in express words, requires that there shall be an actual recording of these

instruments in books specially provided, and declares that they shall be absolutely void against creditors unless so recorded. To say that a chattel mortgage, which has been left for record but which is afterward returned to the owner unrecorded in fact, has, nevertheless, been recorded in contemplation of law, is to disregard the plain meaning of the words used in the statute, and to arbitrarily construe them in such a way is to make the statute embrace a case not covered by it.

We do not, however, concur in the view, which seems to have been held by the vice-chancellor, that, by force of the provision of section 9 of the act, a chattel mortgage is void as against creditors until it is actually transcribed in the records. The seventh section of the act requires the clerk to enter, at the foot of the record, the time when the mortgage was received by him for record, and also to indorse that time on the instrument itself. Manifestly, the purpose of this requirement was to advise persons who should inspect either the record or the mortgage itself of the time when the instrument was lodged for record, and no reason can be perceived for affording this information, unless it was intended that the record, when made, should relate back to that time; in other words, that the deposit of the instrument for record, and its transcription in the record, should be presumed to have occurred at one and the same time. It follows, therefore, that, as soon as a chattel mortgage is deposited for record in the clerk's office, it must be presumed to have been forthwith transcribed in the records; and that presumption continues so long as it remains in the office and until it is actually transcribed; and when that is done the presumption becomes conclusive. When, however, the mortgage [313] is taken away from the clerk's office without having been recorded, the presumption raised by the statute, being contrary to the fact, ceases to exist and the mortgage stands in the same condition, so far as creditors are concerned, as if it had never been lodged for record.

The decree appealed from should be reversed, except so far as it adjudges that the porgy jenny, the platform scale, the windlasses and the reel flyers are chattels, and therefore free from lien of the appellant's mortgage.

Tests for Determining What are Fixtures are stated in Gunderson v. Swarthout, 104 Wis. 186, 76 Am. St. Rep. 860; Thompson v. Smith, 111 Iowa, 718, 82 Am. St. Rep. 541; Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858; Fuller, Warren Co. v. Harter, 110 Wis. 80, 84 Am. St. Rep. 867. It is said in Baker v. McClurg, 198 Ill. 28, 92 Am. St. Rep. 261, that to determine the irremovable character of fixtures,

three tests are applied by modern authorities, viz.: 1. Actual annexation to the realty or some appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is put; and 3. The intention of the parties making the annexation to make a permanent accession to the freehold. That the intention of the parties is a controlling consideration, see McFarlane v. Foley, 27 Ind. App. 484, 87 Am. St. Rep. 264; Edwards etc. Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514. The fact that chattels may be removed and sold for other uses, or that they were not made with special adaptation to the building in which they are placed, is not conclusive of the question whether they have become fixtures: Feder v Van Winkle, 58 N. J. Eq. 70, 51 Am. St. Rep. 628.

An Instrument is Recorded the moment it is lodged in the proper office for registration and the fees paid; Farabee v. McKerrihan, 172 Pa. St. 234, 51 Am. St. Rep. 734; Davis v. Whitaker, 114 N. C. 279, 41 Am. St. Rep. 793; note to Koch v. West, 96 Am. St. Rep. 403. As to the proper manner for recording a mixed mortgage, see the note to Koch v. West, 96 Am. St. Rep. 401; and as to the effect of recording a mortgage in the wrong book, see Cady v. Purser, 131 Cal. 552, 82 Am. St. Rep. 391; note to Koch v. West, 96 Am. St. Rep. 400.

CURRIE v. NEW YORK TRANSIT COMPANY AND NATIONAL DOCKS RAILWAY COMPANY.

[66 N. J. Eq. 313, 58 Atl. 308.]

EMINENT DOMAIN.—The Quantity of Interest which a railroad corporation obtains in land taken under the power of eminent domain is that which the statute conferring the power authorizes it to acquire; the legislature may authorize the taking of a fee, or any less estate, in its discretion. (p. 649.)

EMINENT DOMAIN—When Owner Retains no Interest.—If a Railroad Corporation takes land under the power of eminent domain conferred upon it by the general railroad law of New Jersey, it becomes vested with the whole present estate in the land, and the former owner retains no interest therein for the protection of which he is entitled to invoke the aid of a court of equity. (p. 652.)

Charles C. Black, for the appellants.

Collins & Corbin, for the respondents.

314 GUMMERE, C. J. The New York Transit Company laid an oil pipe line on the right of way of the National Docks Railway Company, with the consent of the latter. A part of this right of way was acquired by the Bergen Neck Railroad Company (to whose rights the National Docks Railway Company has succeeded) from the predecessors in title of the appellants by condemnation proceedings taken under sections 12

and 13 of the general railroad law—the Bergen Neck Railroad Company having been incorporated under that statute. The bill in this cause was filed to compel the removal of the pipe line from this portion of the right of way, the contention of the appellants being that they still retain, in the land condemned, such an interest as entitles them to prevent it from being used for any other than strictly railroad purposes, and that the Bergen Neck company only acquired by the condemnation proceeding "a right of way for railroad purposes over and across the land in question, leaving the fee therein, and in and to the soil thereof, vested in" the appellants.

On final hearing the bill of complaint was dismissed. on the ground that the appellants had no such interest in the land condemned as entitled them to interfere with the use to which it was being put by the respondents, even though such use was ultra vires the corporation. The complainants appeal from the decree of dismissal.

The extent of the interest acquired by a railroad corporation in lands condemned by it has been the subject of frequent discussion, and much variance of opinion has been expressed on the subject, not only generally but in our own decisions. In the [315] case Taylor v. New York etc. R. R. Co., 38 N. J. L. 28, Chief Justice Beasley says: "The fee in the land is not acquired by the company, but a mere easement in such land; the title remains in the owner, the property being made servient to the purposes of the railroad." In the case of New Jersey Zinc etc. Co. v. Morris Canal etc. Co., 44 N. J. Eq. 404, 15 Atl. 230, 1 L. R. A. 133, Vice-Chancellor Van Fleet declares that "where the state invests a corporation with the sovereign prerogative of eminent domain for the purpose of enabling them to construct and operate a public highway, and take land by force of their charter, or by any other means than by grants for the purposes of such highway, it is manifest that the plain purpose of the grant to them is not to give them capacity or invest them with power to acquire such an easement in the land as will enable them fully to accomplish the purpose for which they were created." On appeal to this court the Zinc company case was affirmed on the opinion of the vice-chancellor: Morris Canal etc. Co. v. New Jersey Zinc etc. Co., 47 N. J. Eq. 598, 22 Atl. 1076. In the case of Pennsylvania R. R. Co. v. Breckenridge, 60 N. J. L. 583, 38 Atl. 740, Justice Adams, delivering the opinion of this court, declares that a grant of power to condemn lands for railroad purposes "will

be construed to give merely the power to take an easement adequate to the accomplishment of the corporate design." On the other hand, in the case of De Camp v. Hibernia Mine R. R. Co., 47 N. J. L. 43, Justice Depue expresses the opinion that by condemnation proceedings an estate in the land itself was vested in the company and not a mere easement therein. So, too, Chief Justice Beasley, in the case of New York etc. R. R. Co. v. Trimmer, 53 N. J. L. 1, 20 Atl. 761, fifteen years after the delivery of his opinion in the Taylor case, changing the view expressed by him in that case, held that the interest acquired by condemnation proceedings was not a mere easement in the land, but such an estate as would support an action of ejectment brought to recover possession of it. Again, in the late case of United States Pipe Line Co. v. Delaware etc. R. R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572, Justice Depue, [316] delivering the opinion of this court, reiterated the view expressed by him in the De Camp case.

Notwithstanding that three of the decisions referred to are those of this court, the question presented by this appeal is not one to which the doctrine of stare decisis is applicable, for the reason that the expression of view as to what interest in the land was acquired by a corporation by the exercise of the power of eminent domain was, in each of these cases, entirely obiter. In the New Jersey Zinc and Iron Company case, the land, which was the subject matter of the controversy, was claimed by the canal company not by virtue of any condemnation proceedings taken for the purpose of acquiring it, but solely by adverse possession for more than twenty years. The same situation existed in the case of Pennsylvania R. R. Co. v. Breckenridge, 60 N. J. L. 583, 38 Atl. 740. In the United States Pipe Line Company case the question presented was the right of the pipe line company to lay its pipe across lands held by the railroad company, not by virtue of any condemnation proceeding but by conveyance.

The quantity of interest which a railroad corporation obtains in land taken by it under the power of eminent domain is that which the statute conferring the power authorizes it to acquire. The legislature may authorize the taking of a fee, or any less estate, in its discretion: United States Pipe Line Co. v. Delaware etc. R. R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572; Sweet v. Buffalo etc. R. R. Co., 79 N. Y. 299, 300. It is manifest, therefore, that it cannot rightly be said, on the one hand, that nothing is ever acquired by such proceedings

except a mere easement in or right of way over the land condemned; nor, on the other hand, that something more than a mere easement, or right of passage over or through the land, is always acquired. For instance, in the charter of the Morris and Essex Railroad Company, under which the Delaware, Lackawanna and Western Railroad Company is operating its railroad in this state, and the provisions of which called forth the expression of opinion of Justice Depue in the United States Pipe Line Company case before referred to, the declaration of the statute, in conferring the power to condemn land, is, that, upon the making of the *17 award by the commissioners (or upon the rendition of the verdict by the jury on appeal from the award), and "upon payment of the sum so found by the commissioners or by the jury, with costs, if any, the said corporation shall be deemed to be seised and possessed in fee simple of all such lands and real estate," etc. (Pub. Laws 1835, p. 28); while the power conferred by the statute involved in the decision of the case of De Camp v. Hibernia Mine R. R. Co., 47 N. J. L. 43, is as follows: "That when any corporation formed under the provisions of this act shall take legal proceedings to acquire the right of way for its proposed railroad beneath the surface of the earth, such right of way shall not include the right to permanently use or occupy the surface of the earth immediately above such railroad, but shall be confined to a mere right to tunnel and excavate the earth for its tracks": Pub. Laws 1879, p. 167, sec. 3.

It needs no argument to show that the interest acquired in land by virtue of proceedings taken under the one statute is as widely different from that acquired from proceedings taken under the other, as would be the case were the interests obtained by deed or grant from the land owner instead of by the exercise of the power of eminent domain.

The extent of the interest which the National Docks Railroad Company has in the land involved in this litigation is that which the Bergen Neck Railroad Company was authorized to acquire by the provisions of sections 12 and 13 of the general railroad law. Section 12 of the act provides that, in case of the inability of the company to purchase land needed by it for the purposes of its road, commissioners shall be appointed "to examine and appraise the said land and assess the damages"; that such commissioners shall "proceed to view and examine the said land, and to make a just and equitable estimate or appraisement of the value of the same and an assess-

ment of damages to be paid by the company for such land, which report shall be made in writing, and filed in the clerk's office of the county in which the land is situate; and thereupon, and on payment or tender of the amount awarded, the said company is empowered to enter upon and take possession of the said land, for the purposes aforesaid, and the said report, and proof of payment or tender of the amount awarded, shall at all times be considered as plenary evidence of the right of the company to have, hold, use, occupy, possess and enjoy the said land."

318 Section 13 of the act authorizes an appeal from the award of the commissioners by either party and a trial by jury, and declares that, on such appeal, "it shall be the duty of the jury to assess the value of the land and damages sustained." The only effect of section 13 is to substitute the verdict of the jury, in case of an appeal, for the award of the commissioners.

By these statutory provisions the company is not limited to the acquisition of a mere easement or right of passage over the land condemned. It is authorized to acquire the land itself when, in its judgment (subject to the usual judicial review in limine), the exigencies of the case demand it. When the land itself is sought to be taken and not a mere temporary right or limited interest in it (as was the case in Hepburn v. Jersey City, 67 N. J. L. 114, 50 Atl. 598; S. C., on error, 67 N. J. L. 686, 52 Atl. 1132), the commissioners and the jury, on appeal, are to estimate and assess the value of the land, and the company must pay the value so estimated and assessed as a prerequisite to its right to enter and take possession. When they have made the payment they are to have, hold, use, occupy, possess and enjoy the land so long as they devote it to the uses for which they are authorized to acquire it. Where land is held by a railroad company under a deed containing the words of this statute, it can hardly be doubted that the conveyance, having been made in consideration of the payment of the full value of the land, operates to strip the grantor of all present estate, right, title and interest in the land, and to vest the same in the company so long at least as its corporate life continues to exist and so long as it continues to devote the land to the uses which its charter prescribes, "and there seems no reason [to quote the language of Chief Justice Beasley in New York etc. R. R. Co. v. Trimmer, 53 N. J. L. 1, 20 Atl. 761] why this language, as it stands in this statute, is to be interpreted

differently from what it would if it were found in a deed from the land owner to the company."

It is contended that, because the right of the company to enter and take possession of the land, after payment of the award is given by the statute "for the purposes aforesaid," the land owner still retains such an interest in the land as will enable [319] him to restrain an unauthorized use of it by the company. But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceeding, or to reserve to the land owner any rights in the lands taken. They merely limit the uses to which the lands may be put. And it is to be observed that this limitation is not confined to lands taken by the exercise of the power of eminent domain. The charter of the company (the general railroad law) imposes it equally upon lands acquired by conveyance from the owner. Whether the land be acquired by the one method or the other, when the company enters upon and takes possession thereof it does so for the purpose of subjecting it to the uses which its charter authorizes.

Nor does the fact that, while in possession and so using the land, the company subjects it to an additional and unauthorized use operate to devest it, to any extent, of the estate which it has acquired therein: McKelway v. Seymour, 29 N. J. L. 321.

The complainant's bill, therefore, was properly dismissed, for, as the condemnation proceeding vested in the Bergen Neck Railroad Company the whole present estate in the land, and that estate was not devested by the act of its successor in subjecting the land to the additional and unauthorized use complained of, the complainants had no interest therein for the protection of which they were entitled to invoke the aid of a court of equity: Barnet v. Johnson, 15 N. J. Eq. 481.

It may be that the state, acting through the attorney general, may restrain the unauthorized use by a railroad company of lands acquired by it under its charter powers. This, however, is a question not involved in the case and, therefore, one not now requiring consideration.

The decree appealed from should be affirmed.

As to Whether a Fee or Only an Easement is acquired in condemnation proceedings under the power of eminent domain, see Mayor etc. of Baltimore v. Cowen, 88 Md. 447, 71 Am. St. Rep. 433; Johnston v. Old Colony R. R. Co., 18 R. I. 642, 49 Am. St. Rep. 800; Vermilya v. Chicago etc. Ry. Co., 66 Iowa, 606, 55 Am. Rep. 279; Kansas Central Ry. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190; Aldrich v. Drury, 8 R. I. 554, 5 Am. Rep. 624.

POWER v. POWER.

[66 N. J. Eq. 320, 58 Atl. 192.]

DIVORCE—Desertion—Support of Family.—Although a husband continues to provide for the support of his family after separating from them, his conduct may constitute the matrimonial offense of desertion. (p. 656.)

DIVORCE—Desertion—Agreement for Separation.—A husband may be guilty of willful, continued and obstinate desertion, notwithstanding articles of separation are signed after he deserts his wife, if he knows that she dissents from the separation, and he is determined to continue it. (p. 656.)

DIVORCE—Custody of Child, When Awarded to Mother.—When a divorce is granted a woman on the ground of desertion, the custody of a boy of ten years may be awarded her, notwithstanding possible material advantages to be secured by awarding the custody of the child to his father. (p. 659.)

Richard V. Lindabury and William R. Barricklo, for the appellant.

Crouse & Perkins, for the respondent.

320 DIXON, J. The parties to this suit were married June 24, 1891; in Montclair, and resided there as husband and wife until September, 1899, during which time they had three children, of whom two are still living. For some time prior to September, 1899, their cohabitation had not been harmonious, and early in 321 that month the husband told his wife that her presence was extremely distasteful to him, that he was very sorry he had ever met her, and that he did not wish to live with her. To this the wife replied that she was perfectly willing to do everything in her power to make their home life as pleasant as possible, that it made her extremely unhappy to see matters in such a condition, and she asked him if they could not be adjusted. He answered that he had not the slightest intention of trying in any manner whatever, that he did not desire to and did not intend to. A day or so afterward the wife requested her brother in law, Mr. Westervelt, to see her husband about their difficulties. Mr. Westervelt did so, and on the witness-stand thus related his interviews with the husband: "I told Dr. Power [the husband] that his wife had told me of her last conversation with him; that she wanted me to see him; that his father also wanted me to see him, and do what I could to make him willing to continue to live with

her; I asked him if he would not be, under any circumstances, willing to do so; told him she had asked me to ask him that; he said he would not; he would not live with her under any circumstances; he wanted to be rid of her; I asked him what his reasons were—whether he had anything against her; he said that had nothing to do with the case—the fact was that he would not live with her; I tried to make him change his mind; talked to him about the disgrace it would bring upon his children; suggested to him that it would be more expensive than he could stand; I brought every means I could think of to bear upon him to make him state that he would be willing to try to continue to live with his wife; he refused. I asked him if there was not something she could do—any change she could make in the course of her living—that would make him more contented with his home life; stated that she was willing to do anything that he would ask. He said there wasn't anything. A few days afterward, on the morning of September 14th, I went into his office shortly after breakfast. I said that his wife had asked me to make another appeal to him; that she was exceedingly desirous on the children's account, if on no other, to keep the home together—to patch things up so that they could continue to live together. He cut me very short and said there was nothing further of that kind to discuss; he wouldn't discuss it, and furthermore. he thought he had made it clear to me the last time I had seen him that what he wanted was a divorce. He expressed a wish that she should get a divorce from him. I said she was unwilling to—wouldn't do it. He asked me questions about the law in the matter [Mr. Westervelt being a lawyer] and I explained it to him. 'Well,' he said, 'I want that divorce and I don't want anything else; all my efforts will be directed to that end, and I want you to put it to Mary [Mrs. Power] in that light.'"

322 The truth of this narration is not denied. On the same day the husband left home and went to live with his father in the same town, and since that time the husband and wife have lived apart.

Immediately after the separation. the husband employed an attorney, Mr. Jones, to act for him in the matter. Thereupon Mr. Jones saw Mr. Westervelt and assured him that Dr. Power would not return to the house while his wife was in it; that it was desirable to arrange some modus vivendi; that Dr. Power would require his wife to leave Montclair and sign away all her dower as a condition of receiving any support from him;

that Dr. Power wanted to keep his house and his office, which was in it (he being a physician), and Mrs. Power must leave, as he would not live with her; that if she did not leave Montclair and sign an agreement, which should be prepared, she would not get any support from him; but if she did do so, Dr. Power's father would be willing to look after the matter of income.

This being the attitude of the parties, an agreement was prepared, and on November 15, 1899, Mrs. Power, on the advice of Mr. Westervelt, and having, she says, no other alternative, joined with her husband and a trustee in signing it. This writing declares that Dr. and Mrs. Power agree that they will live, and continue to live, apart; that Mrs. Power shall not remain in Montclair, but outside of that town, shall have the right to choose her own separate residence; that she shall execute proper instruments for relinquishing her right of dower; that she shall have the custody of the children until they are seven years of age, after which their custody shall be subject to further arrangement, and that Dr. Power will pay to the trustee ninety-five dollars a month for the support of Mrs. Power and the children during her natural life, subject to deduction in certain specified events.

Upon the execution of this instrument Mrs. Power, with her children, moved to the city of New York, where she has since resided, receiving from her husband, or his father ninety-five dollars per month and, by her own exertions as a teacher, earning the rest of her necessary expenses.

In November, 1902, she filed a petition in the court of 223 chancery for divorce, because of her husband's desertion; but, after hearing, the petition was dismissed, on the ground, first, that there had been no desertion; second, that if there had been, it ceased to be willful and obstinate upon the execution of the agreement. From this dismissal the petitioner appeals.

That on September 14, 1899, Dr. Power deserted his wife seems to us indubitable. Having declared to her that he would not live with her, having heard her earnest expressions of desire that their cohabitation should be continued, he abandoned the matrimonial home and asserted his determination not to return while she was there. Certainly nothing more is wanting to make desertion complete. That he continued to send provisions to the house so that his wife and children might have food may indicate that he had not given up all concern

for their existence, but is not at all inconsistent with the matrimonial offense called desertion. As was said by Lord Penzanse, in Yeatman v. Yeatman, L. R. 1 Pro. & D. 489: "A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support; but if the cohabitation is put an end to against the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is in my judgment complete." To the same effect was the decision in Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579, which, in Anonymous, 52 N. J. Eq. 349, 28 Atl. 467, was cited with approval by Chancellor McGill.

The effect upon this desertion produced by the agreement of November 15, 1899, requires more consideration. It is certain that the agreement did not give to either spouse, as against the other, the right to continue the separation. Notwithstanding it, each was entitled to demand of the other a resumption of marital relations: Miller v. Miller, 1 N. J. Eq. 391; Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926. Consequently the only question is whether it either indicates or gave rise to a change in the mental attitude of either party, showing mere consent to the separation instead of protest on the part of the wife, and instead of obstinate persistence on the part of the husband.

324 In solving this question the terms of the instrument are, of course, important, and they militate strongly against the petition of the appellant. But from the very nature of the inquiry they cannot be conclusive; they are only a part of the circumstances from which the truth must be inferred. No matter how explicit the declaration of the wife's agreement to live apart from her husband and to release him from his marital obligations, it is credible that she was but yielding to the necessities of the case, still recognizing, as the law recognized, the continuance of marital duty, both for herself and for her husband. And it is equally credible that the husband was aware of this condition and remained separated from his wife, not because he believed she assented to such separation, but because his resolution never to resume cohabitation was unaltered. If such a state of facts appears, they constitute willful, continued and obstinate desertion, no matter what is said in articles of separation: 1 Bishop on Marriage and Divorce, 6th ed., sec. 805b. Such was the decision in Nott v. Nott, L. R.

1 Pro. & D. 251, and in Crabb v. Crabb, L. R. 1 Pro. & D. 601, the judge ordinary remarked upon the distinction between a separation induced by a written agreement and a separation of which the real cause was the determination of a husband to abandon his wife, and the writing only put a false face upon the transaction. In Moores v. Moores, 16 N. J. Eq. 275, Chancellor Green gave effect to such a deed of separation as a ground for defeating an application by the husband for divorce, because of his wife's desertion, notwithstanding her continued purpose not to live with the complainant; but he based his conclusion also upon the fact that the husband had never intimated a desire or even a willingness that the state of separation should cease. Evidently he thought that such an intimation, made in good faith, would strip the deed of its force. His quotation from the opinion in Butler v. Butler, 1 Pars. Sel. Cas. 335, clearly shows that, when such a deed has been signed, the question still remains whether the separation resulted from or was continued because of the agreement expressed in it, or was the willful and perverse conduct of a deserter.

If, with this view of the question at issue, we consider the evidence, the statutory fault of the husband is proved.

325 When in September, 1899, Dr. Power left his wife and their two children, one under six, the other under one year of age, Mrs. Power had no means of livelihood except as she could earn it or it should be given to her. Her husband, although a physician in middle life, was earning so little that alimony secured by judicial decree would furnish very scant maintenance. His purpose not to have her living in his home was declared to be, and after utmost efforts to change it, seemed to be irrevocable, and was already in course of execution. Her brother in law, her only counselor, advised that she submit to what was demanded as the condition of any voluntary contribution for support of herself and her little ones, and her father in law, a man of wealth, promised such contribution on her compliance with her husband's demands. In yielding under these circumstances there is no sign of any withdrawal from that disposition of which she and her counsel had given her husband repeated assurance, a disposition protesting against separation and willing to do anything to win the husband back to their home. She was but saving what was salvable from the inevitable wreck.

The continuance of the husband's determination is also manifest. His demand that she should leave not only the house

but even the town where they had lived, so that his practice might as little as possible be disturbed; the insertion of that provision in the deed of separation; his desire, expressed before the deed was signed, that his wife should know that he was absolutely intent on divorce; his assertion, when examined in this cause, that he had "had no personal dealings with Mrs. Power whatever" since the separation began, and the tone of all his testimony during that examination, make it plain that at no time has he relented in the least from that hostility to marital relations which caused their severance. Nor has he ever had the slightest reason for thinking that, if he suggested to his wife a desire for reconciliation, she would not gladly meet him with an unchanged purpose.

On all the evidence we can reach no other conclusion than that the desertion, which took place in September, 1899, began and has continued because of the willful, persistent and obstinate determination of Dr. Power to abandon his wife.

326 The causes for such determination are confessedly inadequate. They need not be further stated than by quoting the defendant's own words on the witness-stand: "It was distressing to her and distressing to me, and particularly distressing to the children for us to live together."

The decree dismissing the wife's petition should be reversed and in its stead a decree should be entered divorcing the parties from the bond of matrimony because of desertion by the husband.

The petition of Mrs. Power also prays that the custody of the children may be awarded to her. In response the husband, by way of cross-petition, asks that the custody of the older child, a boy, born in May, 1894, may be awarded to him, and the chancellor has so decreed.

After much hesitation we deem this decree also unwarranted.

Three considerations were chiefly influential upon the mind of the learned vice-chancellor by whom the decree was advised: the wealth and character of the husband's parents, who were willing to take the boy into their home and educate him; the desirability of withdrawing the boy from city life into a country home, and of subjecting him to such useful restraints as a father is more likely than a mother to impose.

But, as to the first point, it must be remembered that the decree gives the custody of the child to his father, not to his grandparents, and that they will be under no obligation to him other than such as their affection may create. While this affec-

tion may be strengthened by association with the child, we should not assume that without association it will be barren of utility to him while they live to manifest it. It is reasonable to hope that, with their abundant means, they will desire in any case to afford him the benefits of education.

As to the difference between city and country life the advantage of either over the other for a boy approaching maturity depends much upon the surroundings. The neighborhood in which Mrs. Power and the children live appears by the testimony to be an excellent one, the residence of refined people, many of whom are her friends, and with whose children this boy associates in play and at school. Two or three months every [327] summer she and they spend on the seashore of Rhode Island, and their health has been good, better than when they lived in Montclair.

On neither of these points does there appear any great preponderance in favor of awarding custody to the father.

But, on the remaining ground for judgment, the advantage of abiding with one parent rather than the other, we think the preponderance is decidedly with the mother.

The boy is only ten years of age, too young, even if he were an unruly child, to be beyond maternal control; he has been brought up under his mother's care, and undoubtedly feels for her the affection which such a relationship usually establishes, while his feeling for his father must be modified by estrangement. No suggestion is made that Mrs. Power is not in every respect fit to fulfill her duty to her children. Since their birth she has displayed toward them an ardent and self-sacrificing love, for which we find no equivalent in her husband's disposition, who appears to be, on the contrary, of a hard, intolerant and unsympathetic temper. The effect upon the moral and spiritual nature of the child, produced by constant association with such a mother far outweighs in value the possible material advantages to be secured by separation from her.

On the score of pecuniary ability to maintain a home, the evidence furnished by Mrs. Power's conduct since the separation is satisfactory if that ability be supplemented by such assistance as it will be Dr. Power's duty to render.

In view of all conditions we think the custody of the children should be awarded to Mrs. Power, and that the contrary decree should be reversed.

Let the cause be remitted to the court of chancery that proper order may be made for alimony, for the maintenance of the chil-

dren and for other matters incidental to the decrees now directed.

A Divorce may be granted a woman on the ground of desertion, notwithstanding her husband has from time to time contributed to her support during the period of separation: Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579. And a divorce may be granted to a woman, although she has signed articles of separation: See the monographic note to Baum v. Baum, 83 Am. St. Rep. 783.

COOPER v. COLSON.

[66 N. J. Eq. 328, 58 Atl. 337.]

STATUTE OF FRAUDS—Part Performance.—A parol agreement to convey or devise lands is unenforceable at law, and also in equity, unless there has been a partial or full performance in certain respects, in which case it may be specifically enforced. (p. 661.)

STATUTE OF FRAUDS.—Payment of a Part, or even of the whole, of the purchase money, is not an act of part performance to take a contract for the conveyance of land out of the statute of frauds. (p. 662.)

STATUTE OF FRAUDS—Part Performance.—To take a contract out of the statute of frauds on the ground of part performance, the terms of the contract must be clear, definite, and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. (p. 662.)

STATUTE OF FRAUDS—Contract to Devise Land in Return for Services.—The performance of services which are neither exceptional nor extraordinary, and which can be compensated upon a quantum meruit, does not take an oral agreement to devise a farm in consideration of such services out of the statute of frauds. (p. 664.)

STATUTE OF LIMITATIONS.—When Compensation for Services is not to be made until a certain date, or the happening of a certain event, full compensation may be recovered at law for all services performed prior to that date, as the statute of limitations does not begin to run until the time so fixed. (p. 664.)

Enoch S. Fogg and David J. Pancoast, for the appellants.

Isaac O. Acton and Jonathan W. Acton, for the respondent.

329 FORT, J. This is a suit in equity for specific performance of an alleged contract for the devise of lands. The bill is filed against the heirs at law of Joseph P. Colson, who died intestate, leaving three farms in the county of Salem, in this state.

The bill states the alleged agreement to have been "that if your oratrix would continue to live with him [Colson] and act as his housekeeper, to serve him and look after his interests, as she had done, he would compensate her fully and completely; that he would 'leave' her a farm; by which words your oratrix charges that said Joseph P. Colson meant, and did intend for your oratrix to understand, that he would make and execute his last will and testament, and would therein, in due form of law, devise to her a farm."

The prayer of the bill is that the heirs at law be decreed "to convey to your oratrix, her heirs and assigns, the farm and plantation of which the said Joseph P. Colson died seised and hereinbefore particularly described and set forth, known as the 'Peterson farm.'"

The answer denies the agreement as alleged in the bill or any other agreement of like character.

The proof shows, I think, that the agreement was made, and that Colson frequently stated that he did intend to leave to the complainant the Peterson farm, or that the Peterson farm was hers, or similar statements, which clearly indicate that a parol agreement was made to devise, in consideration of the labor and services of the complainant, the Peterson farm to her.

By our "act for the prevention of frauds and perjuries," approved March 27, 1874, it is provided, "that no action shall be brought . . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized": Gen. Stats., p. 1603, sec. 5.

330 An agreement to convey or devise lands wholly in parol is unenforceable at law. It is equally so in equity, unless there has been a partial or full performance in certain respects, in which case such an agreement may be specifically enforced by a court of equity, notwithstanding the statute of frauds. The authorities to sustain this principle of equitable jurisdiction are collected and fully stated in 3 Pomeroy's Equity Jurisprudence, page 456, section 1409, note 2.

The complainant in this case relies upon a partial or complete performance of the contract alleged to sustain her prayer for specific performance.

That the complainant did act as housekeeper, and attend upon and care for Colson, and did perform her part of the agreement in this regard, is proven, and if such a performance of her agreement to serve the deceased can be considered part performance within the rule which permits equity to decree specific performance of contracts for the conveyance or devise, of lands, she is entitled to such a decree in this case.

Stated plainly, the agreement proven in this case was to convey or devise to complainant the "Peterson farm" in consideration of her paying Colson, as the purchase price for the same, her labor and personal service as his housekeeper and attendant for so long a period as he should live. Payment of a part or even the whole of the purchase money is not an act of part performance to take a contract out of the statute of frauds: Fry's Specific Performance, 4th ed., secs. 613, 614; Snell's Equity, 464, par. 4; Pomeroy's Specific Performance, 159, sec. 112; Lippincott v. Bridgewater, 55 N. J. Eq. 208, 36 Atl. 672; Green v. Richards, 23 N. J. Eq. 32; Browne on Statute of Frauds, 5th ed., sec. 461; Cochrane v. McEntee, 51 Atl. 279 (Vice-Chancellor Emery); Brown v. Brown, 33 N. J. Eq. 650, 660; 26 Am. & Eng. Ency. of Law, 2d ed., 54.

In every case, in order to take the case out of the statute on the ground of part performance, irrespective of other questions, two things are requisite: The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively [331] referable to the contract: Wallace v. Brown, 10 N. J. Eq. 308; Brown v. Brown, 33 N. J. Eq. 650.

Professor Pomeroy, in a note at page 457, volume 3, of his work on Equity Jurisprudence, declares, among the acts which do not constitute part performance, the "payment of the purchase price in whole or in part," and states that the rule is otherwise in the state of Iowa, owing to a statute which expressly makes such payment a part performance.

This same learned author gives two acts, which he characterizes as controlling acts, of part performance which will take a parol agreemnt of sale out of the statute and permit a court of equity to decree specific performance thereof, namely: (a) Actual open possession; (b) permanent and valuable improvement made on the land; or these two combined: 3 Pomeroy's Equity Jurisprudence, p. 457, sec. 1409.

But in this case it is contended that, in the absence of possession taken or any permanent improvement made upon the

property, there are other special acts of personal service and the like which, when performed upon condition that land will be conveyed, will also entitle the party so performing to a decree for the specific performance of a parol agreement to convey lands. Three cases decided in the court of chancery in this state are relied upon by the complainant to sustain this contention. The first of these in Johnson v. Hubbell, 10 N. J. Eq. 322, 64 Am. Dec. 773, decided by Chancellor Williamson, in 1855; the second is Van Duyne v. Vreeland, 12 N. J. Eq. 142, also a decision of Chancellor Williamson; the third is Davison v. Davison, 13 N. J. Eq. 246, decided by Chancellor Green.

I shall not attempt a review of these cases. Johnson v. Hubbell and Davison v. Davison are not in all respects in point under the issue here, but Van Duyne v. Vreeland does seem to have been clearly determined upon the question, sub judice.

Chancellor McGill says "that equity will specifically enforce such a parol agreement at the instance of a complainant who shall have completely performed it upon his part, is now established in this state beyond controversy. The remedy is afforded upon the ground that it will work a fraud upon him who, induced [332] by the agreement, has, in good faith, so performed it as to irretrievably change the situation of the parties to his disadvantage, to permit the other party to refuse fulfillment upon his part. It has had frequent recognition and application in adjudged cases in our courts." He cites all the New Jersey cases: Vreeland v. Vreeland, 53 N. J. Eq. 387, 389, 32 Atl. 3.

As a general statement, this language is unexceptionable. But the mere proof of the performance of services is not sufficient. Such services may be adequately compensated for by a recovery of damages. Such services thus performed, are of no greater efficacy to take the case out of the statute than would be a payment in whole or in part of the consideration money agreed to be paid upon a parol contract to convey land for cash.

It must appear, to constitute ground for a decree for the specific performance of an oral agreement to convey land, founded upon alleged services, that the services were in some respects of an exceptional character, and that it is obvious that the parties not only did not intend that they should be measured by ordinary pecuniary standards, but that they were of such a peculiar character that it is impossible to estimate their

value by any such standard: 1 Lead. Cas. Eq. 1054, 1055; Rhodes v. Rhodes, 3 Sand. Ch. (N. Y.) 279.

Where it appears, as in Van Duyne v. Vreeland, 12 N. J. Eq. 142, that the result of the performance of the labor and service under the agreement has been such as to change the whole course of the life or life work of the complainant, on the faith of the contract to devise or convey, the case is one which is within the same rule as to part performance as where possession of the land has been taken or improvements made thereon: Pomeroy's Specific Performance, p. 161, sec. 114.

The true rule seems to be, as stated by Chancellor Williamson in Van Duyne v. Vreeland, 12 N. J. Eq. 142, "that when there has been such a performance on both sides as puts the complainant in a situation which is a fraud upon him unless the agreement is fully performed," specific performance should be decreed.

If such fraud exists it estops the defendant from setting up the statute as a bar to the right of specific performance, because [333] the agreement to convey was not in writing: Snell's Equity, 461; Twiss v. George, 33 Mich. 253; Smith v. Yocun, 110 Ill. 142; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. Rep. 273, 32 L. ed. 664; Tiedeman on Equity Jurisprudence, sec. 495.

The mere performance of services, which may be compensated for in damages, is not sufficient to take the case out of the statute: Cronk v. Trumble, 66 Ill. 428; Edwards v. Estell, 48 Cal. 194; Carabill v. Marsh, 38 Ohio St. 331.

Where compensation is not to be made until a certain date, or the happening of a certain event, full compensation may be recovered at law for all services performed prior to that date, as the statute of limitations in such case does not begin to run until the period so fixed: Stone v. Todd, 49 N. J. L. 274, 282, 8 Atl. 300.

In such cases, if the services are such as can be compensated for on the quantum meruit, the remedy is ample: McElroy v. Ludlam, 32 N. J. Eq. 828; Smith v. Administrators of Smith, 28 N. J. L. 208, 74 Am. Dec. 49; Gay v. Mooney's Admr., 67 N. J. L. 27, 50 Atl. 597.

We do not think the facts proven in this case bring the complainant within the rule established by the cases. The services she performed were no doubt performed in part, though not wholly, in reliance upon compensation by way of the conveyance of a farm. But her services were neither exceptional nor extraordinary.

She in no way changed her mode of living, or course of life, or life work, because of them. What she did was of such a character as to be easily and adequately compensated on the quantum meruit. There is nothing to establish that she had abandoned any other plan of life work or calling to devote herself to the deceased in consideration of the promised conveyance of a farm. Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversations or jocular remarks of intent to devise or convey at death can readily be turned into serious import. The statute declares that agreements to convey land not in writing are void. If equity is to overthrow the statute, on the ground that, owing to the peculiar character of the facts in a given case, it would be a fraud not to [334] hold one of the contracting parties estopped from setting up the statute, such power should be exercised upon the most clear proof, not only of the contract to devise or convey the land in question, but of the fact that the rendition of the services was wholly referable to the contract to convey, and solely predicated upon that agreement, and that proper and adequate compensation for the services cannot otherwise be made, because of the fact that, in reliance upon the contract, it appears reasonably probable that the complainant has irretrievably changed the whole course of his life and circumstances in order to fulfill his part of the agreement.

The decree of the court of chancery is reversed and the bill dismissed.

That Part Performance of a contract concerning real estate may take it out of the operation of the statute of frauds, see McCoy v. McCoy, 32 Ind. App. 38, 102 Am. St. Rep. 223, and note; Cauble v. Worsham, 96 Tex. 86, 97 Am. St. Rep. 871; Pike v. Pike, 121 Mich. 170, 80 Am. St. Rep. 488; Butler v. Thompson, 45 W. Va. 660, 72 Am. St. Rep. 838. For the application of this rule to oral agreements to make a devise of lands in return for personal services, see Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653; Ellis v. Cary, 74 Wis. 176, 17 Am. St. Rep. 125; notes to Christy v. Barnhart, 53 Am. Dec. 545; Johnson v. Hubbell, 66 Am. Dec. 785.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

VAN REED v. PEOPLE'S NATIONAL BANK.

[173 N. Y. 314, 66 N. E. 16.]

NATIONAL BANKS.—An Attachment cannot Issue Out of a State Court Against the property of a national banking association, whether solvent or insolvent. (p. 670.)

STATUTE—Act of Congress not Repealed.—The Act of Congress of July 12, 1882, to Enable National Banking Associations to extend their corporate existence does not repeal the earlier acts prohibiting attachments from issuing from the state courts against national banking associations. (pp. 670, 671.)

Motion to vacate an attachment against the property of the defendant, a national banking association, on the ground that it was issued contrary to the laws of the United States. In the trial court, the motion was denied. On appeal to the appellate division, the order was reversed, two justices dissenting, and leave was given to appeal to the court of appeals, and the following questions were certified for decision: "1. Is the defendant exempt from attachment before judgment under section 5242 of the United States Revised Statutes of 1901, page 3517? 2. Are the rights claimed by the plaintiff, to attachment against the defendant before judgment, and to the jurisdiction thereby acquired, preserved and given by section 4 of the act of Congress of July 12, 1882 (U. S. Comp. Stats. 1901, p. 3457)?"

Carlton B. Pierce, for the appellant.

Percy S. Dudley and George B. Woomer, for the respondent.

[216] VANN, J. The questions certified depend upon the construction of certain statutes of the United States, and such construction will be aided by investigating their history. By section 52 of the national currency act, approved June 3, 1864, all transfers, assignments, etc., made in contemplation of insolvency by a banking association organized under the act, were declared void. Section 57 of the same act, after naming the courts (including various state courts) in which actions might be brought against national banks, continued as follows: "Provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located": 13 U. S. Stats. at Large, 116, c. 106, secs. 52, 57. By the act of March 3, 1873, section 57 of said act was amended by adding thereto the following: "And provided further, that no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any state, county, or municipal court": 17 U. S. Stats. at Large, 603, cl. 269, sec. 2. By the act to revise and consolidate the statutes of the United States in force on the first day of December, 1873, approved June 22, 1874, section 52 of the original act and said amendment of section 57 were consolidated in section 5242 by attaching the latter at the end of the former, but not in the form of a proviso: U. S. Rev. Stats., sec. 5242 (U. S. Comp. Stats. 1901, p. 3517). The only other statute that is claimed to have any bearing upon the questions presented is an act to enable national banking associations to extend their corporate existence, approved July 12, 1882: 22 U. S. Stats. at Large, 162, c. 290 (U. S. Comp. Stats. 1901, p. 3457). By section 4 of that act the rights and privileges, as well as the duties and liabilities, of any banking association extending [217] the period of its succession in accordance with the act, are preserved, with this proviso: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In 1880 the right to issue an attachment against the property of a solvent national bank was sustained by this court upon the ground that the prohibition of section 5242 applies only to insolvent corporations, or those about to become so: Robinson v. National Bank of Newberne, 81 N. Y. 385, 392, 37 Am. Rep. 508. In 1883 the right to issue an attachment against the property of an insolvent national bank was denied by this court. It was further held that section 5242 was not repealed by the act of July 12, 1882, because the latter relates to the jurisdiction of courts to entertain suits, and the former to particular proceedings in such suits: Raynor v. Pacific Nat. Bank, 93 N. Y. 371. In 1887 the subject was considered by the supreme court of the United States: Pacific Nat. Bank v. Mixter, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567. In that case it appeared that a national bank became embarrassed on the 20th of November, 1881, "and was placed in charge of a bank examiner, in whose control it remained until March 18, 1882, when its doors were opened for business with the consent of the comptroller of the currency." In March and April, 1881, while it was a going concern and so far as appears, solvent, attachments were issued against its property, and it was held that they were void. The broad doctrine was laid down by Chief Justice Waite with whom all the justices concurred, that an [318] attachment could not issue out of a state court against the property of a national banking association, whether solvent or insolvent. The court said: "The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of section 5242 shows the opinion of the revisors and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of section 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for it was part of a section which, while providing for suits in the courts of the United States or of the state, as the plaintiff might elect, declared in express terms that, if the suit was begun in a state court, no attachment should issue until after judgment. The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as

the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the state must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank": Page 726. It was also held that the act of July 12, 1882, did not repeal the provision by which the remedy of attachment is taken away altogether, so that it "cannot be used under any circumstances." In 1889 the subject was considered by the court of appeals for the third time, in an action in which an attachment had been issued against a national bank on the 18th of June, 1887, and a receiver of the bank was appointed nine days later. The special term denied the motion to vacate, but the general term reversed and vacated the attachment. Upon appeal [319] this court affirmed "on the authority of Pacific Nat. Bank v. Mixter," 124 U. S. 721, 7 Sup. Ct. Rep. 718, 31 L. ed. 567; Bank of Montreal v. Fidelity Nat. Bank, 17 N. Y. St. Rep. 88, 1 N. Y. Supp. 852, 112 N. Y. 667, 20 N. E. 414. Assuming that the banking association in that case was insolvent when the attachment was granted, still it is to be observed that this court did not cite its own Raynor case, which involved an insolvent bank, as the authority for its judgment, but cited the Mixter case, in which it was held that an attachment against a national bank, whether solvent or insolvent, is void. We think, and such is the recollection of Judge Gray, the only member of the present court who participated in that decision, that it was the intention of this court to yield its previous views to those expressed by the supreme court of the United States upon the subject. All the courts of last resort in the different states that have passed upon the question have held that the prohibition of the federal statute applies to all national banks, regardless of their pecuniary condition: Freeman Mfg. Co. v. National Bank of the Republic, 160 Mass. 398, 35 N. E. 865; Planters' Loan and Savings Bank v. Berry, 91 Ga. 264, 18 S. E. 137; First Nat. Bank v. La Due, 39 Minn. 415, 40 N. W. 367; Dennis v. First Nat. Bank of Seattle, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777; Safford v. First Nat. Bank of Pittsburgh, 61 Vt. 373, 17 Atl. 748; Rosenheim Real Estate Co. v. Southern National Bank (Tenn.), 46 S. W. 1026. The same conclusion was reached by the circuit court of the United States for the southern district of New York: Garner v. Second Nat. Bank of Providence (C. C.), 66 Fed. 369.

The power to create national banks carries with it the power to protect them by conferring special rights, privileges and immunities. In 1873 Congress evidently thought that the efficiency of these institutions might be impaired if attachments were issued out of the state courts against their property, and it therefore prohibited such writs, among others, altogether. The only question before us is whether that is still the effect of the acts of Congress as they now stand. [320] While the use of the words "such association," in section 5242, would justify the construction contended for by the appellant, that the prohibition is confined to associations which have committed an act of insolvency, the court of last resort for the construction of federal statutes has decided the other way, and we are bound by its conclusion: Pacific Nat. Bank v. Mixter, 124 U. S. 721, 7 Sup. Ct. Rep. 718, 31 L. ed. 567. We do not think the opinion in that case is obiter so far as it applies to a solvent bank, for, as we understand the statement of facts, the Pacific National Bank was solvent when the attachments were issued against it. While it became embarrassed, six or seven months later, it does not appear that it was insolvent or had committed an act of insolvency, or had done anything in contemplation of insolvency, when the attachments were issued or levied. The chief justice obviously did not write an elaborate opinion to show that an attachment could not issue against an insolvent bank, for that was not open to question. It has always been conceded that the statute at least prohibits an attachment against an insolvent bank, but the question considered and decided was whether an attachment could be issued against a solvent bank. That was a live question, still open in that court, and there is no suggestion, either in the statement of facts or the opinion, indicating that the court regarded the question before it as different from the question now before us. The first question certified to us should, therefore, be answered in the affirmative.

The second question involves the effect of the act of July 12, 1882, but this requires no discussion, as it has already been held by the supreme court of the United States, as well as by ourselves, that said act did not repeal the earlier acts of Congress prohibiting attachments against national banks: Pacific Nat. Bank v. Mixter, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567; Raynor v. Pacific Nat. Bank, 93 N. Y. 371.

The argument is made that if the defendant had been a foreign state bank, with funds here, our courts could have acquired jurisdiction in rem through the process of attachment, and that

hence the same jurisdiction exists over the [321] property of a foreign national bank situated in this state. This construction of the last act, however, would violate the spirit of all the acts relating to the subject, when read together. We agree with the appellate division that "the act of 1882 was intended to prescribe the forum for litigations by and against national banks, and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where, and the courts in which, such actions may be prosecuted, but it was not intended to regulate the procedure in such actions, when brought." Nor, we might add, was it intended to so regulate the method of commencing an action as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself.

We think that the order appealed from should be affirmed, with costs; that the first question certified should be answered in the affirmative, and the second in the negative.

Parker, C. J., and Gray, O'Brien, Haight, Martin and Cullen, JJ., concur.

Order affirmed.

A Writ of Error was prosecuted to the supreme court of the United States resulting in a judgment of affirmance, the opinion therein being as follows:

"We deem the answer to the first question already determined by the decision of this court in Pacific Nat. Bank v. Mixter, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567. The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit. Section 5242 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 3517) is as follows: 'All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made

with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes—shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court.'

"The language of the latter clause of this section would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction, or execution against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court. This was the view taken by this court in Pacific Nat. Bank v. Mixter, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567. The origin of section 5242, and its growth from previous enactments, were pointed out by Mr. Chief Justice Waite, who delivered the opinion of the court in that case: 'It is clear to our minds that, as it stood originally as part of section 57 [13 Stats. at Large, 116, c. 106], after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. . . . . It stands now, as it did originally, as the paramount law of the land, that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the state must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.'

"Since the rendition of that decision it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property: Freeman Mfg. Co. v. National Bank, 160 Mass. 398, 35 N. E. 865; Planters' Loan etc. Bank v. Berry, 91 Ga. 264, 18 S. E. 137; First Nat. Bank v. La Due, 39 Minn. 415, 40 N. W. 367; Safford v. First Nat. Bank, 61 Vt. 373, 17 Atl. 748; Rosenheim Real Estate Co. v. Southern Nat. Bank (Tenn. Ch. App.), 46 S. W. 1026; Garner v. Second Nat. Bank, 66 Fed. 369. It is argued by the plaintiff in error that the decision in the Mixter case, 124 U. S. 721, 8 Sup. Ct. Rep. 718, 31 L. ed. 567, should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that, at the time when the attachment was issued, the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the state, which is likewise specific in its terms, giving the right of foreign attachment as against solvent national banks. We find nothing in the case of Earle v. Pennsylvania, 178 U. S. 449, 20 Sup. Ct. Rep. 915, 44 L. ed. 1146, which qualifies the decision announced in the Mixter case. We

therefore conclude that the Mixter case is applicable here, and the decision therein announced meets with our approval.

"The answer to the second question involves a consideration of the act relating to national banks of July 12, 1882, section 4 (22 Stats. at Large, 162, c. 290, U. S. Comp. Stats. 1901, p. 3458), which is as follows: 'That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed.'

"There is nothing in this section enlarging the right of attachment against national banks. Before the passage of this section circuit courts of the United States had jurisdiction of suits against national banks because they were corporations of federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the federal courts simply upon the ground that they were created by and exercised their powers under the acts of Congress: Petrie v. Commercial Nat. Bank, 142 U. S. 644, 12 Sup. Ct. Rep. 325, 35 L. ed. 1144; Continental Nat. Bank v. Buford, 191 U. S. 119-123, 24 Sup. Ct. Rep. 54, 48 L. ed. 119, 120. It regulated the jurisdiction of the courts to entertain such actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be had against them. Certainly there is nothing in the act repealing the prior provisions of section 5242, above quoted.

"It is further insisted that, whether or not the lien is absolute upon the property of the bank, jurisdiction is obtained of it by the issuing of the attachment; but we cannot take this view. There was no personal service in the court of original jurisdiction, and the attachment being without the power of the court by reason of the terms of the federal statute, no jurisdiction was acquired in the case, either over the person or property of the defendant. We see no error in the judgment of the court of appeals of New York, and the same is affirmed": Van Reed v. People's Nat. Bank, 198 U. S. 554, 25 Sup. Ct. Rep. 775, 49 L. ed. 000.

PEOPLE OF THE STATE OF NEW YORK EX REL. METROPOLITAN STREET RAILWAY COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

PEOPLE OF THE STATE OF NEW YORK EX REL. TWENTY-THIRD STREET RAILWAY COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

PEOPLE OF THE STATE OF NEW YORK EX REL. CENTRAL CROSSTOWN RAILROAD COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

PEOPLE OF THE STATE OF NEW YORK EX REL. CONSOLIDATED GAS COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

PEOPLE OF THE STATE OF NEW YORK EX REL. NEW AMSTERDAM GAS COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

PEOPLE OF THE STATE OF NEW YORK EX REL. BROOKLYN CITY RAILROAD COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

PEOPLE OF THE STATE OF NEW YORK EX REL. CONEY ISLAND AND BROOKLYN RAILROAD COMPANY v. STATE BOARD OF TAX COMMISSIONERS.

[174 N. Y. 417, 67 N. E. 69.]

MAGNA CHARTA—Rights Acquired by the Colonists.—The rights granted by Magna Charta relating to cities, boroughs and towns were brought over by the colonists, and the liberties and customs of localities reappeared on a novel and wider basis in the town meetings of New England and the various colonies, including New York. (p. 678.)

MUNICIPAL CORPORATIONS—Home Rule Under the Constitutions of New York.—Under the various constitutions of New York, the management of the local political business of localities, whether as large as a county or as small as a village, was intrusted to local officers selected by the communities where the officers acted and through which their jurisdiction extended. Unless the office or the officer is mentioned eo nomine in the constitution, the name may be changed or the office abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. Like functions, however, cannot be transferred to a state officer. (pp. 679, 680.)

THE GENERAL FRANCHISE of a Corporation is its right to live and do business by the exercise of the corporate powers granted by the state. (p. 680.)

SPECIAL FRANCHISE, What is.—When a Right of Way Over a Public Street is Granted to a Railway Company, with leave to construct and operate a street railway thereon, the privilege is known as a special franchise. (p. 680.)

CONSTITUTIONAL LAW.—Every Presumption is in Favor of the Constitutionality of an Act of the Legislature, and if the constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction. Still, it is no less their duty to adjudge a statute void if it is in conflict with the real intent of the fundamental law when considered in the light of history in all its aspects. (p. 682.)

ASSESSMENT OF FRANCHISE, to What Extent may Include Tangible Property.—It is no objection to a statute authorizing the assessment of a franchise that it includes therewith tangible property which is an inseparable part of a franchise, and which could neither be used nor sold to advantage except by regarding it and the franchise as constituting a new entity, or as one thing, single and entire. (p. 686.)

ASSESSMENT OF FRANCHISE not a Local Matter.—The function of assessing special franchises does not in its nature belong to a county, city, town, or village, if it has never been exercised by officers of such localities. It is not exclusively local in character, and home rule applies only to functions peculiar to localities. (p. 686.)

TAXATION—Constitutional Law.—The Entire Taxing Power Belongs to the Legislature, and not a dollar can be raised for local or general purposes to carry on self-government in a locality or in the state, or to provide for the public safety, order, or health except by its authority. This supreme power should be considered in connection with the home rule provision of the constitution, and neither should be so construed as to embarrass or cripple the other. (p. 688.)

STARE DECISIS.—Principles are not Established by What was Said, but by what was decided, and what was said is not evidence of what was decided unless it relates directly to the question presented for decision. General expressions must be taken in connection with the cases in which those expressions were used. (p. 690.)

ASSESSMENT, When may be Committed to State Boards.—What are known as the home rule provisions of the constitution of New York do not prevent the legislature from creating a new system of taxation embracing within it a new character of property, including incidental additions, and committing the power of assessment to a state board of experts under circumstances when its action is justified by a sound public policy. (p. 691.)

THE TAXATION of Special Franchises does not impair the obligation of a contract, and thus violate the federal constitution. (p. 691.)

TAXATION, Exemption from.—Unless There is an Express Stipulation not to tax a franchise or other state grant, the right of taxation is reserved as an attribute of sovereignty. (p. 691.)

CONSTITUTIONAL LAW—Assessment and Taxation of Franchises.—A statute authorizing for the first time in the history of a state the assessment, for the purposes of general taxation, of special franchises, to be made by the state board of taxing commissioners to be appointed by the governor, and declaring that the term "real estate" shall include the land itself, and all supports and inclosures for electrical conductors and other appurtenances, all surface, underground, or elevated railroads, including the value of all franchises, rights, or permission to construct, maintain, or

operate the same in, under, above, on, or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches, and other fixtures, permitted or authorized to be made, laid, or placed in, upon, above, or under any public or private road, street, or ground; all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance, or product capable of transportation or conveyance therein, or that is protected thereby, including the value of all franchises, rights, or permission to construct, maintain, or operate in, under, above, upon, or through any streets, highways, or public places any mains, pipes, tanks, conduits, or wires with their appurtenances for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic, or other purposes; and that a franchise, right, authority, or permission specified in the statute shall, for the purposes of taxation, be known as a special franchise, and that a special franchise shall be deemed to include the value of the tangible property of the person, copartnership, association, or corporation situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchise; and that the tangible property so included shall be taxed as a part of the special franchise—is not in conflict with the home rule provisions of the constitution of New York, nor with the provisions of the constitution of the United States regarding the impairment of contracts; nor will such statute be declared invalid because impracticable or incapable of execution, nor because a special franchise should be separately assessed. (p. 692.)

Writ of error to review assessments of franchises made in 1900 under the taxing laws of the state, as amended by chapter 712 of the Laws of 1899. A referee was appointed, who heard evidence and made findings of fact and conclusions of law, including in the latter the conclusion that the act under which the assessments were made was constitutional and the proceedings thereunder duly taken. The supreme court adopted the findings and conclusions of the referee, but an appeal was taken to the appellate division, which, two justices dissenting, reversed the order of the supreme court on the ground that the statute relied on violated the home rule provisions of the constitution of New York. The state board of taxing commissioners appealed.

The provisions of the statute involved appear more fully in the statement by Mr. Justice Brewer of the supreme court of the United States following this opinion.

John Cunneer, attorney general, and William H. Wood, for the appellant.

David B. Hill, Charles F. Brown, Frank H. Platt, William H. Page, Jr., Charles A. Collin, William F. Sheehan, John L. Wells, Thomas L. Hughes, Charles H. Werner, Charles V. Nel-

lany, William A. Dykman, John C. Tomlinson and Edgar J. Kohler, for the respondents.

[431] VANN, J. These appeals were argued together and the questions of law presented are common to all the proceedings. The only questions peculiar to any case were questions of fact, which have been finally disposed of by the concurrent action of the courts below, as they united in adopting the facts as found by the referee. The main discussion at bar, as well as in the four opinions written in the appellate division, related to the question whether the statute under which the assessments were made violates that part of the constitution which provides for home rule in certain political divisions of the state. In order to answer this question it will be useful to inquire: 1. What does the constitution prohibit? 2. What does the statute command? 3. What have the courts held as to the validity of other statutes relating to similar subjects?

The principle of home rule, or the right of self-government as to local affairs existed before we had a constitution. Even prior to Magna Charta some cities, boroughs and towns had various customs and liberties which had been granted by the crown or had subsisted through long user, and among them was the right to elect certain local officers from their own citizens and, with some restrictions, to manage purely local affairs. These customs and liberties, with other rights, had been so trampled upon by the king as to arouse deep hatred of centralization of power, and we find among the many grants of the Great Charter that "the city of London shall have all its ancient liberties and its free customs as well by land as by water. Furthermore, we will and grant that all other cities and burgs and towns . . . . shall have all their liberties and free customs": Cap. 13. "All evil customs . . . . shall immediately be inquired into by twelve knights of the same county, upon oath, who [432] shall be elected by good men of the same county," and after inquisition made "they shall be altogether destroyed by them, never to be restored, provided this be notified to us before it is done": Cap. 48. After this marvelous statute, rights, which had before rested largely on custom, rested on law, with a guaranty against violation by the amazing covenant of King John that if refused redress for an "excess committed," his subjects should be released from their allegiance and at liberty to make war upon him, "saving harmless our person and persons of our Queen and children and when it hath been redressed they shall obey us as they have done before": Cap. 61.

The rights thus secured after a long struggle and great pressure, although at times denied and violated by the ruling monarch, were never lost, but were brought over by the colonists the same as they brought the right to breathe, and they would have parted with the one as soon as the other. The liberties and customs of localities reappear on a novel and wider basis in the town meetings of New England and the various colonies, including the colony of New York. The right of the inhabitants of townships and manors to meet at stated times in public town meetings, elect town officers and transact town business, was well established while we were a colony and was recognized by different statutes enacted by the governor, council and general assembly: Van Schaack, chapters 1201, 1224, 1419, 1448, 1454, 1459, 1460, 1499, 1536, 1562; Livingston & Smith, chapters 43, 654.

The business transacted at the town meeting related to highways, care of the poor, and matters of purely local concern. It was confined to the affairs of a small district, and was clearly separated from public matters of interest to the colony at large. These officers elected, generally by viva voce vote, were supervisors, assessors, collectors, constables, commissioners of highways and overseers of the poor. The powers and duties of these officers were regulated by statute, but the right to select them resided in the people of the locality and was stubbornly insisted upon as inviolable.

433 Such was the state of affairs when the first constitution was adopted. While that instrument organized the state, it granted no rights to the people, but was their own creation, expressing the restraints that they desired placed upon themselves by preserving certain principles and methods of government which they wished to remain unalterable. Thus the constitution of 1777 recognized local self-government as already existing, and continued and protected it, so that it could not lawfully be departed from without changing the constitution itself. It provided that "town clerks, supervisors, assessors, constables and collectors and all other officers heretofore eligible by the people shall always continue to be so eligible": sec. 29. Sheriffs, coroners, loan officers, county treasurers, clerks of supervisors and justices of the peace were to be appointed: Secs. 26, 29. Thus our earliest constitution did not create the right to elect the administrative officers of towns, but continued it as it had existed during the history of the colony while it was under the dominion of the English crown. The local officers mentioned by name as "eligible by the people" were town of-

ficers, and in fact almost all officers of other local divisions were appointed by central authority.

The second constitution, framed in 1821, continued the right by the general clause, applicable to county, town, city and village officers, that "all officers heretofore elected by the people shall continue to be elected; and all other officers whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as may by law be directed": Art. 4, sec. 15. Sheriffs, coroners, and some other county officers were for the first time made elective.

The third constitution, drafted in 1846, continued the principle and expanded the right by the following provisions: "All county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county officers, as the Legislature shall direct. All city, town and village officers, whose election or appointment 434 is not provided for by the Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct": Art. 10, sec. 2. The same provision was carried forward, ipsissimis verbis, into our present constitution: Art. 10, sec. 2.

These and other commands of the different constitutions, when read in the light of prior and contemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the state and to continue, preserve and expand local self-government.

This was effected through a judicious distribution of the power of selecting public officers, by assigning the choice of local officers to the people of the local divisions, and to the people generally, those belonging to the state at large. The management of the political business of localities, whether as large as a county or as small as a village, is intrusted to local officers selected by the communities where these officers act and through which their jurisdiction extends. The principle of home rule is preserved by continuing the right of these divisions to select their local officers, with the general functions which

have always belonged to the office. Unless the office, by whatever name it is known, is protected, as the courts have uniformly held, the right to choose the officer would be lost, for with his former functions gone he would not be the officer contemplated by the constitution, even if the name were retained. Unless the office or officer is mentioned eo nomine in the constitution, the name may be changed, or the office abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. Local functions, however, cannot be transferred to a state officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been steadfastly [435] held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority. The office may go, but the function must be exercised locally if exercised at all. While no arbitrary line is drawn to separate the powers of local and state officers, the integrity of the local office is protected, with its original and inherent functions unimpaired. It is interference, whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the constitution prohibits: People v. Draper, 15 N. Y. 532; People v. Raymond, 37 N. Y. 428; People v. Albertson, 55 N. Y. 50; Astor v. Mayor etc. of New York, 62 N. Y. 567; Matter of the Mayor etc. of New York, 99 N. Y. 569, 2 N. E. 642; Matter of Gertrum v. Board of Supervisors, 109 N. Y. 170, 16 N. E. 328; Koch v. Mayor etc. of New York, 152 N. Y. 72, 46 N. E. 170; People v. Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838; People v. Board of Supervisors of Oneida Co., 170 N. Y. 105, 62 N. E. 1092; Matter of Brenner, 170 N. Y. 185, 63 N. E. 133; Allison v. Welde, 172 N. Y. 421, 65 N. E. 263.

The statute in question authorizes the assessment or valuation, for the purpose of general taxation, of all special franchises by a state board of tax commissioners appointed by the governor: Laws 1899, c. 712. The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the state. The general franchise of a street railroad company, for instance, is the special privilege conferred by the state upon a certain number of persons known as the corporators to become a street railroad corporation, and to construct and operate a street railroad upon certain conditions. Such franchise, however, gives the corpora-

tion no right to do anything in the public highways without special authority from the state, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a special franchise, or [436] the right to do something in the public highway, which except for the grant, would be a trespass.

The statute, which is an amendment of the general tax law, declares in substance, that the right, authority or permission to construct, maintain or operate some structure, intended for public use, "in, under, above, on or through streets, highways or public places," such as railroads, gas pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise. For the purpose of taxation such a franchise is made real estate, and is "deemed to include the value of the tangible property of a person, copartnership or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise and taxed as a part thereof": Sec. 2, cl. 3. This includes nothing but what is in the street, directly or indirectly, and excludes power-houses, depots and all structures without the lines of the street. The taxes thus imposed are for general purposes, are collected in the same way, and used for the same objects as other taxes upon the general assessment-roll.

Prior to the passage of this act general franchises had been taxed for the benefit of the state under a valuation made by a state officer, with the sanction of the courts: Laws 1896, c. 908, secs. 182, 190; People v. Roberts, 154 N. Y. 101, 47 N. E. 980. Special franchises, however, had never been lawfully assessed either by local or state authority, but were made taxable property by the act before us for the first time in the history of the state: People v. Barker, 146 N. Y. 304, 40 N. E. 996; People v. Neff, 19 App. Div. 590, 46 N. Y. Supp. 385; affirmed on opinion of Cullen, J., below in 154 N. Y. 763, 49 N. E. 1102. The right to assess special franchises by central authority is challenged as a violation of the principle of home rule embodied in the constitution, and especially the right to assess the tangible property annexed thereto and included therein by the act, because the latter is withdrawn from the jurisdiction of the local assessors by whom it had been theretofore assessed.

[437] Every presumption is in favor of the constitutionality of an act of the legislature, and if the constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction; still, it is none the less their duty to adjudge the statute void if it is in plain conflict with the real intent of the fundamental law, when considered in the light of history and in all its aspects: Sweet v. City of Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; People v. Terry, 108 N. Y. 1, 14 N. E. 815.

What was the situation that confronted the legislature when it passed this statute to raise money for the support of the government? The governor had officially announced that "the farmers, the market gardeners, and the mechanics and tradesmen having small holdings are paying an improper and excessive portion of the general taxes." The legislature wished to distribute this burden in a just and equitable manner, to take part of the load from those who carried more than their share, and to relieve the farms from some of the effects of depreciation in value through competition with the cheap and fertile lands of the west. It found property scattered all over the state worth nearly two hundred millions of dollars, which was not taxed at all and had never been taxed. This property consisted wholly of special franchises or privileges give by the state, mainly to corporations furnishing to the public transportation, water, light and other necessities or conveniences of daily life. It had grown rapidly in extent and value during recent years. Its value rested upon the right to use in some manner the public highways of the state, but it was intangible, and doubtless for this reason had never been brought under the taxing power. The legislature also found certain tangible property, which was subject to taxation, situated in the public streets and used only in connection with and as a part of the intangible property not taxed, and of no substantial value except when so used. It found that the valuation of this new kind of property, intangible, invisible and elusive, but of great value would be attended with peculiar difficulties, [438] which would require a degree of knowledge and skill not possessed by local assessors, but belonging only to experts who had long and carefully studied the subject of taxation in all its varied aspects. The problem to place a just and adequate value upon a right capable of valuation, but which was unseen, without form or substance, and, as it were, the mere breath of the legislature. It was a new problem that had never arisen before during the history of the

state, and it was solved, not to meet local needs, but an exigency of state.

How did the legislature deal with this situation?

It created a new system of taxation, brought within its range a new character of property, and assigned the duty of making the valuation to the state board of tax commissioners, composed of tax experts already in office whose sole duty related to the subject of taxation, in all its phases, throughout the entire state. It made the tax commissioners assessors of this new kind of property known as special franchises, clothed them with power to compel the owners to furnish under oath, in addition to a general report containing many details, such information as they called for; authorized them to call upon the local assessors for all facts that they could furnish and to summon aid from all available sources; required them to give notice to the owner affected and an opportunity to be heard, and provided a remedy for review by the courts of every assessment as soon as it was filed. It commanded that all sums, in the nature of a tax, paid by the owner of a special franchise to a municipality for its exclusive use, should be deducted from the tax imposed for local purposes, and exempted the tangible property situated in public highways, and used in connection with the special franchise, from all other forms of taxation: Secs. 42-46. The new kind of property was termed "real estate," just as it might have been termed "personal property" or "neutral property," without changing its nature, which was such as local assessors had never dealt with.

The statute should be considered in the light of circumstances existing when it was passed which were extraordinary [439] and unprecedented. The system thus created had never been known before, and, as its main subject, the act dealt with special franchises, which had never been taxed before. Property unknown as the subject of taxation to the framers of any of our constitutions was brought into the system, which required new methods of valuation and the exercise of functions which had never belonged to local assessors. The property was sui generis, and from its nature could not be valued by local assessors. Unless it escaped taxation in the future, as it had in the past, it was necessary to commit the power to other officers with new functions, wider experience and greater opportunities for observation, who would be able to grasp the new scheme of taxation as a whole. We should not be misled by the terms "valuation" or "assessment," as the simple exercise of judgment, for no

work can be done without that, but should compare the intrinsic nature of the functions exercised by the local assessors for time out of mind with those intrusted to the state tax commissioners, which had never been committed to any board or officer before.

The local assessors dealt with tangible property, which could be seen and was open to the judgment of ordinary men or with written evidence of debts or contracts the value of which could be easily computed. It was their habit to measure weigh and count; to learn the market value from current sales; to pass upon physical and material property which they were accustomed to own, rent or use, and with which they were familiar in their daily life. They saw it, knew it and could judge as to its value. It was before their eyes and they could act upon it directly, without resort to complicated computations.

On the other hand, the valuation of special franchises had never been attempted before, but presented a new field of action and called for the exercise of new and different functions. They could not be seen, handled, measured, weighed or counted. They were specialties and had no market value. There were no sales to guide and no experience from ownership, rental or use to rely upon. The new property is real [440] estate in name, but not in reality, for it is a mere privilege to do something in public streets and places not permitted to citizens generally. While local in a narrow sense, it is unconfined in its real nature, for it depends largely on the earning capacity of a going concern frequently with several special franchises, but with no means of determining the amount earned by each. The value depends upon so many conditions, existing, frequently, in localities widely separated and upon such a complication of facts and figures that the valuation cannot safely be intrusted to men of common knowledge and experience. What greater calamity in the shape of taxation could threaten the vast interests involved than to intrust this important subject to unskilled and incompetent men, some of them willing, it may be, not only to protect their own localities at the expense of others, but to oppress corporations and favor individuals? The burden could not be distributed equally, for each local board would have its own method and theory. Uniform action would be impossible and conflict and confusion would result. A wider view, a different kind of judgment, a balancing of localities and figures, an adjustment and equalization of burdens and an exercise of functions not local in nature were re

quired to meet the situation. As we said in a recent case: "It is no disparagement of the capacity and intelligence of the average assessor to say that it would present to him a problem incapable of accurate solution and a rule of action in the performance of his official duty impossible in practice": People v. Clapp, 152 N. Y. 490, 495, 46 N. E. 842, 39 L. R. A. 237.

The legislature also brought in as an incidental part of the system some tangible property which had been previously assessed by local authority. No tangible property, however, was affected, except such as was situated in the public highways and was incidental to and dependent upon the special franchises as to have no substantial value unless used in connection with them. The relation between the intangible right to run cars in the streets and the tangible property in the rails to run the cars on is so intimate as to be inseparable [441] in any practicable system of estimating values. Of what value are poles, strung with wires, standing in the street, without a special franchise to use them to carry electricity or send the mysterious message? What are appliances worth, when made for a special purpose, if they cannot be used for that purpose? What are rails and ties worth, when so fastened to the land in a public highway as to be legally a part of it, without a special franchise to place and use them there as part of a railroad? All the mains and pipes, poles and wires, rails and ties of the relator, when separated from their special franchises, have no value except as firewood or old iron. The only substantial value is the right to use them in connection with the franchise, and, hence, they are incidental to the franchise. As part of the franchise they are worth something, but severed from it nothing to speak of. Suppose a railroad company should forfeit its special franchise by a violation of the grant, what would its rails and ties be worth? They would cease to exist as rails and ties, and would become simply so much old material, and even the title would vest in the owner of the fee. The expense of grading, placing them in position and paving around them, which is a large part of the original cost, would cease to be an investment, and would be property no longer. They are worth virtually nothing except for railroad purposes, and a railroad cannot occupy a street without a special franchise. Separate them from the franchise by taking away the street privilege, and they are destroyed. Their only value as rails and ties, as distinguished from so much old wood and iron, is gone. Taking the broad and practical view of the subject, which the

legislature had the right to take in creating the new system, they have no assessable value worthy of notice, except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon, and especially in estimating its [442] earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire: People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. 692, 2 L. R. A. 255; Gue v. Tide Water Canal Co., 24 How. (U. S.) 257, 16 L. ed. 635; Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. ed. 111; Buncombe County Commrs. v. Tommey, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186, 29 L. ed. 305.

The function of assessing a special franchise does not, in its nature, belong to a county, city, town or village, for it has never been exercised by officers of such localities, but to the state, by which it is now exercised for the first time. It is not exclusively local in character, and home rule applies only to functions peculiar to localities. It was unknown to our forefathers, who brought over primitive home rule, to the colonists who preserved, or to the founders of the state, who developed it. It is no part of local self-government as known to history, or to learned judges who have written upon home rule in the past. It did not come within the experience of former times, and was not contemplated by the framers of our constitutions. They kept purely local affairs under local control, but this is not local in intrinsic character, for the power to be exercised is not confined to the limits of one community. While some special franchises are within a single tax district, others extend through several and sometimes into different towns, cities and villages. The legislature could not make a law for each case, and in bringing the new system into operation it provided by general rule for all cases of the same general character, whether then existing or expected in the future.

Moreover, a special franchise, now confined to one tax district, may by expansion, through merger, consolidation, leasing and the like, extend into other tax districts. Such an enlargement is open to all, has been the experience of many and

may be the experience of all. The same corporation may have many special franchises, continuous or separate, yet [443] they are all practically one, because they all belong to one system, the earning capacity of which may be ascertained, but not that of each special franchise independent of the others. By removing a central franchise, the line is broken and the value of all seriously impaired. The combination of all into a single enterprise gives the highest, if not the only, value to each. What would a franchise in a town be worth with no right to enter a city or village? While the strength of the chain is in the links, the value of the links is in the chain. Hence, a franchise is not essentially local in character and may require action, observation and estimate beyond the lines of a single tax district, or the accustomed jurisdiction of local assessors. An examination of the books of the corporation may be necessary in making the valuation, yet they may not be kept in the municipality of the assessors' residence. A highway may be local, but the title thereto is not, for whether a fee or an easement, it is held in trust for the people at large, represented by the state, which has control of the streets and of the erections therein: People v. Kerr, 27 N. Y. 188. The franchise is the right to put something in the highway and use it there, and if the right fails, the title to what was thus placed goes with the general title.

The special franchises of a railroad in operation from a city into suburban towns may be properly treated as an aggregation, without a precise situs, as one piece of property producing a gross income, as a single subject of valuation, like all the personal property of an individual, from one end of the line to the other, although the amount, when ascertained, must be apportioned and distributed among the several tax districts affected: Sec. 42. This can make no difference to the company, for it has only so much to pay in any event, and it shows that the work of valuation is not local, but general, in its character, and that it is a matter of central rather than municipal concern. It affects the general public rather than the people of a community. The subject is one that local officers cannot handle, because they cannot consider it as a whole by going without their precincts, but must stop at the boundaries of [444] their several districts. They cannot make the distribution among localities interested in the special franchises. Local assessors still remain local assessors, with every accustomed function intact and unimpaired. Local self-government is un-

touched and there is no invasion of local functions. While special franchises were known when the latter constitutions were adopted, they were not known as taxable property. The office of assessor of special franchises was then unknown. It is not local in nature, but is a new office with new functions adapted to property of a new kind and differing in principle from any ever dealt with by local assessors. Property created by the legislature and never intrusted by it to the local assessors cannot with propriety be said to have been taken away from them.

The entire taxing power belongs to the legislature, and not a dollar can be raised for local or general purposes, to carry on self-government in localities or in the state, or to provide for the public safety, order or health except by its authority. This supreme power should be considered in connection with the home rule provision of the constitution, and neither should be so construed as to embarrass or cripple the other. Home rule, as understood and practiced in the past, giving to localities the right to govern themselves, but not to hamper the government of the state, should be carefully protected from open attack or indirect invasion. Shadows, however, should give way to substance, and the right to create a new system of taxation and bring in property of a new character, hitherto untaxed, with some other property incidental thereto and worthless without it, cannot, as we think, be denied upon principle, and should not be withheld from the legislature unless required by some controlling decision of the court.

While it is difficult to classify all the authorities relating to the subject of home rule, the most of them fall into convenient groups. At the head of the first class stands the celebrated judgment of Chief Judge Denio in People v. Draper, 15 N. Y. 532. In that case the statute combined four counties into one police district, invested five police [445] commissioners appointed by the governor, acting as a board with the mayors of two cities in the district, with all the powers previously belonging to certain local officers of said cities respectively. The new board was authorized to appoint and control all the policemen, who were to act in any part of the district, regardless of residence or county lines. The validity of the act was upheld upon the ground that the commissioners thus appointed were not city officers, although it was strongly challenged at the bar and by a vigorous dissenting opinion, as a violation of the home rule provision of the constitution.

Similar acts creating a new system by erecting a metropolitan fire district, a metropolitan health district, a metropolitan board of excise and a capital police district, each embracing the territory of two or more municipal divisions of the state, were also sustained, although functions formerly belonging to local officers were transferred to state officials: People v. Pinckney, 32 N. Y. 377; Metropolitan Board of Health v. Hiester, 37 N. Y. 661; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; People v. Shepard, 36 N. Y. 285.

An act, however, which established a police district consisting of a city, with a police force already organized, and "three small patches of sparsely settled territory, in all less than a square mile," was held unconstitutional as an obvious attempt to evade the restrictions relating to home rule, because it was designed for the city only, and the outside fragments could have been brought into the city if it was deemed necessary to extend police protection to them: People v. Albertson, 55 N. Y. 50.

All these cases, except the last, involved the right to erect two or more separate municipalities into a new civil division, to authorize officials appointed by the state to perform the duties formerly discharged by local officers, and yet leaving the municipalities in full existence and untouched in all other respects.

Acts authorizing state officials to construct public buildings, parks and highways, the expense of which was to be paid 446 locally, have been uniformly sustained, although the power to make such improvements had been previously vested in the local authorities, and it was urged that the transfer of the power was an encroachment upon local self-government: People v. Flagg, 46 N. Y. 401; Astor v. Mayor etc. of New York, 62 N. Y. 567; People v. McDonald, 69 N. Y. 362; People v. Board of Supervisors of Oneida Co., 170 N. Y. 105, 62 N. E. 1092.

To the next group may be assigned statutes which, directly or indirectly, authorized the appointment of local officers by state officials, or the legislature, or extended the terms of local officers already elected, or limited the power of local authorities in the appointment of local officers. Such legislation has been condemned as in manifest violation of home rule: Warner v. People, 2 Denio, 272, 43 Am. Dec. 740; Devoy v. Mayor etc. of New York, 36 N. Y. 449; People v. Raymond, 37 N. Y. 428; People v. Bull, 46 N. Y. 57, 7 Am. Rep. 302; People v.

McKinney, 52 N. Y. 374; People v. Crooks, 53 N. Y. 648; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People v. Mosher, 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88; Matter of Brenner, 170 N. Y. 185, 63 N. E. 133. In People v. Raymond, which is the chief reliance of the relators, there was an absolute overthrow of the local assessor and the transfer of all his functions to a state officer, which, as the court held, deprived "the people of the city of a right secured to them by the constitution."

The remaining cases decided in this court are not readily classified, but as the validity of the statutes involved was not disturbed, no analysis thereof is necessary: People v. Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344; Allison v. Welde, 172 N. Y. 421, 65 N. E. 263; People v. Dunlap, 66 N. Y. 162; Matter of the Mayor etc. of New York, 99 N. Y. 569, 2 N. E. 642; Matter of McPherson, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; Matter of Gertum v. Board of Supervisors, 109 N. Y. 170, 16 N. E. 328; People v. Durston, 119 N. Y. 569, 16 Am. St. Rep. 859, 24 N. E. 6, 7 L. R. A. 715; Koch v. Mayor etc. of New York, 152 N. Y. 72, 46 N. E. 170.

When new systems have been created for the management [447] of the indigent insane, the infliction of the death penalty or the punishment of convicts, formerly confined by sheriffs in county jails, by imprisonment in penitentiaries, no question seems to have been raised or claim made that such legislation interfered with the principle of home rule. The absence of adjudicated cases relating to these and other subjects which might be mentioned is not without significance. It is also significant that the revisers of our present constitution, acting but a few years ago, made no change in the home rule provision, as it indicates that they were satisfied with the subject as it had been expounded by the courts and acted upon by the people.

None of the cases cited had to do with such a peculiar situation and novel conditions as faced the legislature when it passed the act to tax special franchises. Certain expressions of learned judges, used arguendo, in discussing the subject of home rule, are relied upon by counsel as establishing a principle that controls this case. Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision. "General expressions," as the great federal jurist once said, "are to be taken in connection

with the cases in which those expressions are used": Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290.

A more specific review of the authorities is unnecessary, for it is sufficient to state that neither singly nor collectively have they so construed the constitution as to prevent the legislature, under the circumstances existing when it sought to promote a sound public policy by passing the act in question, from creating a new system of taxation, embracing within it a new character of property including incidental additions, and committing the power of assessment to a state board of experts.

The remaining questions raised by the relators do not require elaborate consideration. We cannot sustain their position that the taxation of a special franchise impairs the obligation of a contract and thus violates the federal constitution: Art. 1, sec. 10. The franchises are grants which [448] usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as the payment of a license fee, or a gross sum down, of a specific sum each year, or a certain percentage of receipts, as a consideration or "in full satisfaction of the use of the streets." There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. Such a stipulation would be void, for no municipality has power to withdraw property from the taxing power of the state, or to provide by ordinance or contract that it shall be free for all time from the common burden which property generally has to bear. Taxation is the rule, with every presumption to support it, while exemption is an exception, with every presumption against it.

The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by an agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the state. There is no implied covenant that property sold by the state cannot be taxed by the state, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to state grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until by the act of 1899 amending the tax law they were added to the other

taxable property of the state. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support [449] of government. No burden is placed upon it except such as is borne by the homes of the people and money saved for support in old age.

While all attempts of municipalities to undermine or destroy franchises by changing the terms of the grant have been promptly repressed by the courts, there is no case which holds that a franchise, whether general or special, cannot be taxed the same as other private property. The relators accepted their franchises subject to the right of taxation that applies to all property in the state, and we agree with the learned referee that the special franchise tax takes nothing from the grant, exacts nothing as further compensation for the privilege, and impairs no contractual obligation.

The further contention of the relators, that the act is impracticable and incapable of execution; that the special franchises should have been separately assessed; that the state tax commissioners adopted no rule in making the assessments; that the relators did not have a proper hearing at the time provided for review, and that due process of law was not observed in the taxation of their property, after due consideration we overrule, without further expression of reasons than already appears.

In reviewing these cases we have received great aid from the strong and exhaustive opinion of the late Judge Earl, for many years a distinguished member of this court, who, acting as referee, decided them in the first instance, after full and careful consideration of all the questions involved. It was the last judicial work of that ripe lawyer and eminent jurist, and we regard his decision as one of the most able and profound judgments ever pronounced by him during his long and useful career.

The order of the appellate division should be reversed and judgment of the special term affirmed, in each proceeding, with costs.

Parker, C. J., O'Brien, Bartlett, Martin, Cullen and Werner, JJ., concur.

Order reversed, etc.

From the Decision of the Court of Appeals a writ of error was prosecuted by the Metropolitan Street Railway Company to the supreme court of the United States, resulting in a statement and opinion by Mr. Justice Brewer as follows:

"On May 26, 1899, the legislature of New York passed an act amending the tax law of the state: N. Y. Laws 1899, c. 712, p. 1589. The first section reads:

" 'Section 1. Subdivision 3 of section 2 of the tax law is hereby amended to read as follows:

" '3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under, or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage, or dockage thereon; all bridges, all telegraph lines, wires, poles, and appurtenances; all support and inclosures for electrical conductors and other appurtenances upon, above, and under ground; all surface, underground, or elevated railroads, *including the value of all franchises, rights, or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places*; all railroad structures, substructures, and superstructures, tracks and the iron thereon; branches, switches, and other fixtures permitted or authorized to be made, laid, or placed in, upon, above, or under any public or private road, street, or ground; all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance, or product capable of transportation or conveyance therein or that is protected thereby, *including the value of all franchises, rights, authority, or permission to construct, maintain, or operate, in, under, above, upon, or through any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic, or other purposes*; all trees and underwood growing upon land, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state. *A franchise, right, authority, or permission specified in this subdivision shall, for the purpose of taxation, be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association, or corporation situated in, upon,*

under, or above any street, highway, public place, or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.'

"The portions in italics are the new matter introduced by the amendment. Other sections were added to the tax law, of which section 46 is as follows:

" 'Section 46. *Deduction from special franchise tax for local purposes.*—If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town, or village in which the tangible property is located, it shall appear that the person, copartnership, association, or corporation affected has paid to such city, town, or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town, or village purposes. The chamberlain or treasurer of a city, the treasurer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership, association, or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town, or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver, or other officer shall immediately credit on the tax-roll to the person, copartnership, association, or corporation affected the amount stated in such certificate, or any tax levied against any person, copartnership, association, or corporation on an assessment of a special franchise for city, town, or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town, or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax, as required by law.'

"Other sections provide the machinery for assessment. This assessment was to be made by the state board of tax commissioners, and one section authorized certiorari to review their proceedings.

"Under this law an assessment was made of the franchises belonging to the plaintiff in error, a corporation created by the consolidation of several corporations, having franchises for the maintenance and operation of street railroads in the city of New York. A certiorari to review this assessment was finally decided by the court of appeals of the state, which, on April 28, 1903 (People etc. v. Tax Commissioners, 174 N. Y. 417, ante, p. 674, 67 N. E. 69, 63 L. R. A. 884), sustained the assessment, and remanded the case to the special term of the supreme court by which court a final judgment was entered, June 22, 1903. Thereupon this writ of error was sued out. Plaintiff in error makes three assignments of error:

" '1. Error in declining to hold that the act of the legislature of the state of New York, approved May 26, 1899 (Laws 1899, c. 712), entitled "An act to amend the tax law in relation to the taxation of public franchises as real property," in so far as it authorizes the assessment imposed by the state board of tax commissioners on March 20, 1900, upon the franchises of the [plaintiff in error] relator above named, deprives said relator of its property without due process of law, in contravention of the fourteenth amendment of the constitution of the United States.

" '2. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment denies to said relator the equal protection of the laws, in contravention of the fourteenth amendment to the constitution of the United States.

" '3. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of contracts, in contravention of section 10, article 1, of the constitution of the United States.'

"Prior to 1874 the legislature of New York may direct grants of franchises, rights, or privileges to use the streets of the city of New York. In that year the following amendment to the constitution was adopted (Const. 1846, as amended, art. 3, sec. 18):

" 'The legislature shall not pass a private or local bill in any of the following cases: . . . .

" 'Granting to any corporation, association, or individual the right to lay down railroad tracks. . . . .

" 'But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or, in case the consent of such property owners cannot be obtained, the general term of the

supreme court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.'

"In 1884 an act was passed (Laws 1884, c. 252, p. 309) giving to the local authorities power to grant franchises for street railroads. This act provided:

" 'Sec. 7. The local authorities of any incorporated city or village to whom application, under the provisions of this act, may be made for consent to the construction, maintenance, use, operation, or extension of a street surface railroad upon any street, road, avenue, or highway, may, at their option, provide for the sale of and sell at public auction the franchise, subject to all the provisions of this act, to so construct, maintain, use, operate, or extend such street surface railway. . . . .'

" 'Sec. 8. Every corporation incorporated under, or constructing or operating a railroad constructed or extended under, the provisions of this act, within the cities of the state having a population of two hundred and fifty thousand or more, as aforesaid, shall, for and during the first five years after the commencement of the operation of any portion of its railroad, annually, on the first day of November, pay into the treasury of said respective cities in which its road is located to the credit of the sinking fund thereof, three per cent of its gross receipts for and during the year ending the next preceding thirtieth day of September, and after the expiration of said five years make a like annual payment into the treasury of said respective cities for the credit of said sinking funds, of five per cent instead of three per cent of said gross receipts: Provided, however, that every corporation now existing and operating a street surface railroad which shall extend its tracks or construct branches therefrom, and operate such extensions or branches under the provisions of this act, or the corporation operating such branches or extensions, shall pay such percentages as aforesaid only upon such portions of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension and branches shall bear to the entire length of its tracks.'

" 'Sec. 4. The consent of the local authorities shall, in all cases, be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with, and shall be filed in the office of the county clerk of the county in which said railroad is located.'

"In 1886 an act amending a prior act of the same year was passed (Laws 1886, c. 642, p. 919), which contained the following terms:

"'Sec. 1. The local authorities of any incorporated city or village, to whom application may be made for consent to the construction, maintenance, use, operation, or extension of a street railroad, or a railroad or railway for the transportation of passengers, mails, or freight, over, upon, under, or through any of the streets, roads, avenues, parks, or public places in such city or village, must provide, as a condition of the said consent to the use of said street, road, avenue, park, or public place, that the right, franchise, and privilege of using the said street, road, avenue, park, or public place shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company or corporation, with adequate security, as hereinafter provided, for the fulfillment of said agreement, and for the commencement and completion of such road according to the plan or plans, and on the route or routes, fixed for its construction, within the time or times, hereinafter designated and prescribed therefor; but this agreement shall not release any such road from the percentages required to be paid by chapter 252 of the Laws of 1884. The legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway. . . . .

"'And in the event of the failure or refusal of the party or corporation operating or using the railroad to be constructed as aforesaid, to pay the rental or percentage of gross earnings agreed upon, then, upon notice to the said party or corporation—of not less than sixty days—the said consent and right to operate such railroad may be declared forfeited, and the same may be resold to the highest bidder in the manner above provided.'

"The special acts passed before the amendment of 1874, which are claimed to constitute contracts, the obligations of which are impaired by this tax legislation, are found, first, in chapter 625 of the Laws of 1868, which granted to certain persons the right to construct, maintain, and operate and use a street railroad, with a provision that 'the said persons, or their assigns, shall pay to the sinking fund commissioners of the city of New York the sum of one thousand dollars per annum, to be applied by them in the same manner as moneys received on account of rentals and leases'; second, in chapter 19 of the Laws of 1871, which, granting the privilege of occupying certain streets with street railroad tracks, provided that the company should 'make compensation to the mayor, aldermen, and commonalty of said city of New York for the value of the rights and privileges herein granted or authorized,' and also prescribed the mode of ascertaining that compensation by three commissioners, whose decision should be final and conclusive as to the company and the mayor, aldermen and commonalty of said city, adding 'the amount so fixed and determined shall be paid to the commissioners of the sinking fund of said city, by the said company, within

thirty days after the same becomes payable, according to the decision aforesaid, and applied to the reduction of the debt of said city'; third, in chapter 508 of the Laws of 1874, which granted the right to 'construct, operate, maintain, and use railways' in certain streets in the city of New York, and provided that 'the said persons, or their assigns, shall annually, on the first day of November, pay into the treasury of the city of New York one per cent of the gross receipts of the road herein provided for, the amount of which gross receipts shall be determined by the sworn statement of the president and treasurer of said railway, but subject to the inspection of its books by the comptroller of the city of New York.'

"Subsequent to the Law of 1884, above referred to, fifteen other franchises now belonging to the relator were granted by the common council of the city of New York. Most of them provided for annual payment to the city of New York of either a fixed amount or a fixed percentage, varying from two to eight per cent of the gross earnings.

"The decision of the court of appeals settles that there is nothing in the law or the proceedings in this case in conflict with the constitution of that state. It is not contended by the plaintiff in error that there is any constitutional objection to the taxation of franchises. The right to subject them to a share in the burden of supporting the government is conceded.

"The main contention is that this tax legislation impairs the obligation of contracts. It must be borne in mind that presumptively all property within the territorial limits of a state is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof, and must make it entirely clear that, by contract or otherwise, the property is beyond its reach. In Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (p. 561, L. ed. 955): 'That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.'

"In Vicksburg etc. R. Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. Rep. 625, 29 L. ed. 770, Mr. Justice Gray cited many authorities, quoting the different phraseology in which, by the several writers of the opinions, the same rule was announced. In Wells v. Savannah, 181 U. S. 531, 21 Sup. Ct. Rep. 697, 45 L. ed. 986, the law was thus stated by Mr. Justice Peckham (p. 539, Sup. Ct. Rep. 700, L.

ed. 991): 'The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment; and the validity of such contract presupposes a good consideration therefor. If the property be, in its nature, taxable, the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties, and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven, and the exemption does not exist.'

"In Chicago Theological Seminary v. Illinois, 188 U. S. 662, 23 Sup. Ct. Rep. 386, 47 L. ed. 641, the same justice declared (p. 672, Sup. Ct. Rep. 387, L. ed. 648): 'The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim.' See, also, Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 495; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. Rep. 72, 36 L. ed. 972; Ford v. Delta etc. Land Co., 164 U. S. 662, 17 Sup. Ct. Rep. 230, 41 L. ed. 590.

"This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by implication. As said by Mr. Chief Justice Taney, in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 549, 9 L. ed. 773, 824: 'The inquiry, then, is, Does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied.'

"Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication, and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation, and maintenance

of a street railroad. These were all that, in terms, were granted. As consideration for this grant the grantees were to pay something, and such payment is nowhere said to be in lieu of or as an equivalent or substitute for taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation.

"In the well-considered opinion of the court of appeals in this case it was stated by Mr. Justice Vann: 'The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year, or a certain percentage of receipts, as a consideration, or "in full satisfaction for the use of the streets." There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. . . . .

" 'The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the state. There is no implied covenant that property sold by the state cannot be taxed by the state, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption The rule of strict construction applies to state grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until, by the act of 1899, amending the tax law, they were added to the other taxable property of the state. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased, and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force; but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of government.'

"It would not be doubted that, if a grant was of specific tangible property, like a tract of land, and the payment therefor was a gross sum, no implication of an exemption from taxation would arise. Whether the amount paid was large or small, greater or less than the real value, if the payment was distinctly the consideration of a grant, that which was granted would pass into the bulk of private property, and, like all other such property, be subject to taxation. Nor would this result be altered by the fact that the payment for the thing granted was to be made annually instead of by a single sum

in gross. If it was real estate it would be equivalent to the conveyance of the tract subject to ground rent, and the grantee taking the title would hold it liable to taxation upon its value. If this be true in reference to a grant of tangible property, it is equally true in respect to a grant of a franchise, for a franchise, though intangible, is none the less property, and oftentimes property of great value. Indeed, growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises. We had occasion to review this subject in Adams Exp. Co. v. Ohio, 166 U. S. 185, 17 Sup. Ct. Rep. 604, 41 L. ed. 965, where we said (pp. 218, 219, Sup. Ct. Rep. 605, L. ed. 976, 977): 'In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal constitution which restrains a state from taxing at its real value such intangible property. . . . . It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country.'

"In State Railroad Tax Cases, 92 U. S. 575, 603, 23 L. ed. 663, 669, is this language by Mr. Justice Miller, speaking for the court: 'That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the state which creates them, admits of no dispute at this day. "Nothing can be more certain in legal decisions," says this court in Society for Savings v. Coite, 6 Wall. 607, 18 L. ed. 903, "than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government: State Freight Tax Case (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 232, 21 L. ed. 146; State Tax on Gross Receipts (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 284, 21 L. ed. 164.'

"It is urged that when the public grants a privilege on condition of the payment of an annual sum the contract implies that the public shall exact no larger amount for that privilege, that to impose a tax is simply increasing the price which the grantee is called upon to pay for the privilege, and Gordon v. Appeal Tax Court, 3 How, 133, 11 L. ed. 529, is relied upon as authority. It is true, in the opinion of the court, announced by Mr. Justice Wayne, is this language (p. 145, L. ed. 535): 'Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed as land

is taxed which has been bought from the state? was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject, in his own apprehension, to the great law of necessity, that we must contribute from it and all of our property something to maintain the state. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price.'

"But there was in that case an express exemption from taxation, in these words: 'And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'

"There being thus an express stipulation on the part of a state not to impose any further tax or burden, the question decided was really the extent of the exemption, and it was held to apply not merely to the franchise, but to the property of the bank. The statements of Mr. Justice Wayne were only by way of argument to support the conclusion that the exemption went beyond the franchise alone. Furthermore, that case has been repeatedly qualified and limited by subsequent decisions. In New Orleans City etc. R. Co. v. New Orleans, 143 U. S. 102, 12 Sup. Ct. Rep. 406, 36 L. ed. 121, Mr. Justice Gray, speaking for the court, said (p. 195, Sup. Ct. Rep. 406, L. ed. 122): 'Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words: Vicksburg etc. R. Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. Rep. 625, 29 L. ed. 770, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the state, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property. In Gordon v. Appeal Tax Court, 3 How. 133, 11 L. ed. 529, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the state was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved: Piqua Branch of State Bank v. Knoop, 16 How. 369, 386, 401, 402, 14 L. ed. 977, 984, 990, 991; New York v. Tax etc. Commrs., 4 Wall. 244, 259, 18 L. ed. 344, 350; Jefferson Branch Bank v. Skelly, 1 Black, 436, 446, 17 L. ed. 173, 178; Farring-

ton v. Tennessee, 95 U. S. 679, 690, 694, 24 L. ed. 558, 561, 562; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 328, 6 Sup. Ct. Rep. 334, 388, 1191, 29 L. ed. 636, 643. The case at bar cannot be distinguished from that of Memphis Gaslight Co. v. Taxing Dist., in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas-works and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: "The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state constitutions and state laws": 109 U. S. 398, 400, 3 Sup. Ct. Rep. 205, 206, 27 L. ed. 976, 977.'

"Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760, is not in point. The city of Charleston, having issued bonds, subsequently passed an ordinance assessing a tax upon all real and personal property in the city, and directed the treasurer to retain out of the interest due on those bonds the amount of the tax. Murray was a resident of Germany, and resisted the reduction of interest, and it was held that the city could not, by way of a tax, reduce the amount of the interest which it had promised to pay to this nonresident holder, the court saying in its opinion (p. 440, L. ed. 761): 'A nonresident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city; and the city council was authorized to make assessments only upon the inhabitants of Charleston, or those holding taxable property within the same.'

"Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594, is also not in point. An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc., of the streets on which its railway was authorized to be constructed. The company, having accepted, complied with the terms of this ordinance, the city attempted by assessments for special improvements to compel the railway company to pay for further work of the nature required by the original ordinance, and it was held that the obligations assumed by the railway company in respect to street improvements, as provided by the ordinance, could not be increased by special assessments for further improvements. But this involved no question of liability to general taxation, and only held void the effort of the city, under the guise of special assessments,

to increase the obligations specifically assumed by the railway company under the original ordinance.

"In New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352, there was a contract that a certain tax should 'be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this state, or any law thereof,' and the decision simply upheld that exemption specifically contracted for.

"It is further contended that there has been a recognition and practical construction in respect to the grants of these franchises, and on these grounds: 1. No attempt has been made to legislate in respect to their taxation until 1899, although some of them had been in existence for many years; 2. Governor Cleveland, in one of his messages, called the amount required to be paid by the contract a tax, and Governor Roosevelt also spoke of existing 'taxes'; 3. Section 46 of the legislation authorizing the tax upon these franchises provided that 'any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town, or village purposes'; 4. The court of appeals of New York in Heerwagen v. Crosstown Street Ry. Co., 179 N. Y. 99, 104, 71 N. E. 729, 730, said: 'In the first place, both in statutes and in judicial decisions, the term "tax" is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument, the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights, which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the state is at liberty to grant or to withhold at pleasure.'

"We are not disposed to undervalue the force of these suggestions, but it would be giving them undue significance to hold that they are potent to displace the power of the state to subject to the burdens of taxation property within its limits. The word 'tax' is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of the charge or burden imposed by the state for the purposes of revenue for its support. Undoubtedly the payment for the franchise of an annual sum was a burden, and in that sense it might not unnaturally have been spoken of as a tax. Being recognized as a burden, it may also well be that when the franchise itself was of comparatively little value the legislature did not see

fit to subject it to the burdens of ordinary taxation. But the omission of one legislature or a dozen legislatures does not destroy the power of the state. The language quoted from section 46 indicates the desire of the legislature to deal equitably with the corporations holding these franchises. Surely the manifestation of this desire cannot be construed into a repudiation of power. These annual charges are not called taxes, but are spoken of as in the nature of a tax; and the legislature, recognizing the equitable force of the claim based thereon, provided that the corporation be given credit for sums thus payable. In this connection it is well to recall that in section 1 of the act of 1886, supra, these annual charges are called 'rental or percentage of gross earnings.'

"The quotation from the court of appeals must be interpreted in the light of the question presented. That was whether the appellee company was entitled to avail itself of the provision of section 46 just quoted, it having been required by its charter to pay a certain percentage of its gross receipts. It was held that it was so entitled, and the argument was to show that the words 'in the nature of a tax' were used in a broad and comprehensive sense to include a payment made on account of the privilege granted. No question was made or considered as to the liability of the company to the tax on its franchise. Its only claim was to the deduction on account of the percentage of its receipts already paid. The court, in addition to the language quoted, said (179 N. Y. 106, 71 N. E. 731): 'The statute in question was enacted at a special session of the legislature convened by the governor for that purpose. In his message to the legislature he recommended that "it should be provided that from the sum assessed by the state authorities as the tax which a corporation must pay because of its local franchise there shall be deducted the amount already annually paid by it to the locality for such franchise. In no other way is it possible to tax these corporations with uniformity and equity." It may be that this view is erroneous, and that the more accurate and equitable way would be to determine the value of the franchise, not as free and clear, but as burdened by the charges to which it might be subject. Nevertheless, it is plain that this view was accepted by the legislature, for under the scheme provided by the present statute the franchise is to be assessed as real estate; that is to say, not subject to diminution for charges thereon, and the allowance for such charges is made only by deducting them from the tax.'

"We are of opinion that no contract right of the relator was impaired by the legislation in question.

"It is further insisted that the special franchise tax law denies the relator the equal protection of the laws and due process in three separate and distinct aspects, 'namely: 1. In that it adds to the obligations of their various contracts while preserving all the burdens of those contracts; 2. In that it provides for the deduction of annual payments covered by existing contracts from the amount of tax lev-

ied, by reason of which deduction those who agreed to pay for their franchises lump sums or annual amounts less than the new tax are discriminated against; and 3. In that it discriminates against them and subjects them to taxation, while their competitors, operating under the surfaces of many of the same streets, are to be exempted.'

"The first specification is answered by the conclusion that we have reached in respect to the claim of an impairment of contract obligations; for if there was no such impairment, the fact that the companies have escaped the burden for these many years is their good fortune, and in no manner discharges them from the ordinary burdens of taxation which the present law imposes.

"With respect to the second, it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land—part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the government. Further, this whole matter of allowing a reduction on account of that which is spoken of as 'in the nature of a tax,' is a matter of grace on the part of the legislature. The franchises granted were, as we have held, subject to taxation, and the fact that, upon equitable considerations, the state has consented that a certain reduction shall, in some cases, be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the federal constitution to prevent a state from granting exemptions from taxation: Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. Rep. 533, 33 L. ed. 892.

"With regard to the third contention, it may be said that there is a difference between surface and subsurface street railroads sufficient to justify a diversity in the mode and extent of taxation. In Savannah etc. R. Co. v. Savannah, 198 U. S. 690, 25 Sup. Ct. Rep. 690, just decided, taxation of a street railroad was challenged on the ground that a steam railroad which ran into the city and along its streets, and there did some of the same kind of work as the ordinary street railroad, was not subject to the same tax, and referring to this contention, is this declaration by Mr. Justice Holmes: 'The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation.' Further, the condition of the title to the only subsurface road in the city of New York clearly puts it in a class by itself.

"These are all the questions we deem it important to consider. We find no error in the decision of the supreme court of New York, and it is affirmed": People of the State of New York ex rel. Metropolitan St. Ry. Co. v. Tax Commissioners, 199 U. S. 000, 25 Sup. Ct. Rep. 705, 50 L. ed. 000.

Another Writ of Error to the Supreme Court of the United States was prosecuted by the Brooklyn City Railroad Company, resulting in a statement and opinion by Mr. Justice Brewer as follows:

"This case, like the preceding, involves the special franchise tax law of New York. The facts are these: On December 22, 1853, the relator was authorized by the city of Brooklyn to construct, maintain and operate street surface railroads upon specified streets, and required to enter into a good and sufficient bond conditioned for the faithful performance of all the terms and stipulations in the resolutions granting the authority. On December 30th of that year a bond in the sum of $200,000 was duly executed by the relator, and that has ever since been kept in force. The terms and stipulations as to the construction and operation of the railroad need not be mentioned. The resolutions contained these further provisions:

" 'The rates of fare for each passenger and the license fee for each car to be paid annually into the city treasury shall be on the respective lines above mentioned:

" '1. Furnam street route, fare not to exceed 5 cents, license fee, $50. 2. Court street route, fare not to exceed 4 cents, license fee, $20. 3. Powers street route, fare not to exceed 5 cents, license fee, $20. 4. Flatbush avenue route, fare not to exceed 5 cents, license fee, $20. 5. Fulton avenue route, fare not to exceed 4 cents, license fee, $20. 6. Myrtle avenue route, fare not to exceed 4 cents, license fee, $20. 7. Sands street route, fare not to exceed 5 cents, license fee, $10. 8. Front street route, fare not to exceed 5 cents, license fee, $10.'

"'This action of the city of Brooklyn was validated by the state legislature. Other contracts were made by the city of Brooklyn with other companies. Those companies were subsequently consolidated with the relator, which, on the 1st of January, 1900, held forty-five similar contracts with the municipalities for the construction, maintenance, and operation of street surface railroads in the present boroughs of Brooklyn and Queens. Some of these contracts required the annual payment of a certain percentage of the gross receipts. Subsequently, under due legislative authority, the contract arrangements between the relator and the city were modified in respect to the amount of the annual license fee. The statute authorizing the modification contains this clause: 'The said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not release said company from any obligations required by law to keep such streets or avenues, or any part thereof, in repair, which said obligations and the contracts, laws or ordinances creating and enforcing the same are hereby continued in full force and operation.'

"Do these license fees stand as an equivalent for property taxes so that a stipulation in respect to them relieves the property from liability to ordinary taxation? This certainly would not be the general rule. A license fee is understood to be a charge for the privilege

of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax. Take the vast volume of occupations which are subject to licenses from either the nation or the states. Who supposes that, in the absence of some express stipulation, the fees charged for those licenses operate to relieve the property employed in the business from the ordinary burdens of property taxation? The precise question as to the effect of an ordinance imposing a license fee for cars used on a street railroad was before the court of appeals in New York v. Broadway etc. R. Co., 97 N. Y. 275, in which, on page 282, the court said: 'The contract of the defendant arises from the provisions of its charter, by which it agrees to pay a certain sum reserved therein in consideration of the privileges conferred thereby. It is neither a tax nor is it a penalty; and hence the technical rules as to penal actions or suits to recover a tax which are invoked by the appellant have no application.'

"Further, in the statute modifying the license fees, which was accepted by the relator, it was expressly stated that they should 'be taken in full satisfaction for the use of the streets or avenues.' Clearly, therefore, the fees being imposed for a specific purpose, they cannot exempt the relator's property from the tax imposed by the special franchise tax law.

"It is further objected that there was a failure of due process of law, in that the special franchise tax law did not indicate any principle or method for ascertaining the value of the intangible property included in the special franchise, and that the state board did not make any separate valuation of the tangible property, and did not adopt or proceed upon any principle or method in valuing the totality of the tangible and intangible property, but necessarily indulged in mere speculation and guesswork instead of exercising judgment in making the valuation.

"We are of opinion that this objection is without merit. The sections relating to the taxation of special franchises were enacted as amendments to and part of the general tax law of the state, and are to be construed accordingly. By one section the valuation is to be determined by the state board of tax commissioners. By another the owner of every such franchise is required to make a written report to the state board, containing a full description of the franchise, a copy of the special grant, ordinance, or contract under which it is held, or if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon the franchise, together with such other information as the state board may require; and that board is authorized to require, from time to time, further reports containing information upon such matters as it may specify. Not only that; after making the valuation the state board is required to give notice in writing to the owner of the franchise, stating the valuation, and that on a day specified, not less than twenty nor more than thirty days thereafter, it will meet

to hear and determine any complaint against such assessment, and this notice must be served at least ten days before the day fixed for the hearing. At the hearing the owner may file a statement under oath, specifying the respect in which the valuation is incorrect; testimony may be taken and a full investigation had. Another section provides for a review of the assessment by writ of certiorari. These provisions were all complied with. Notice was given to the relator, and on the day fixed for the hearing it appeared and filed its objections. Thereafter it took out a writ of certiorari to review the proceedings of the tax board. Surely by this due process of law was secured. It will not do to say that the valuation of a piece of property is mere guesswork. True, it is often largely a matter of opinion, and mathematical exactness is not always possible. Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that can be required is that the assessing board exercise an honest judgment, based upon the information it possesses or is able to acquire. That valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it, and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value. We are of the opinion that the relator was not denied due process of law in the valuation and assessment of its franchise.

"We see nothing else in the record calling for notice, and the judgment of the supreme court of New York is affirmed": People of the State of New York ex rel. Brooklyn City R. R. Co. v. Tax Commissioners, 199 U. S. 000, 25 Sup. Ct. Rep. 713, 50 L. ed. 000.

LANDAU v. CITY OF NEW YORK.

[180 N. Y. 48, 72 N. E. 631.]

A MUNICIPAL CORPORATION is Liable for the Consequences of the Unlawful Use of Its Streets, sanctioned by its permission. (p. 712.)

NUISANCES.—A Fireworks Exhibition on an Extensive Scale, in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as a matter of law, may properly be found such as a matter of fact. (p. 713.)

MUNICIPAL CORPORATIONS—Fireworks, When Liable for Injuries Done by.—If a municipal ordinance exists, providing that no person shall fire, discharge, or set off fireworks of any description within the limits of a city, and its board of aldermen adopts, and its mayor approves, a resolution purporting to suspend such ordinance for a time specified so far as it applies to the meetings and parades of political parties, such resolution does not repeal the ordinance, but amounts to a permit to do a prohibited act for a limited period, and

makes the city liable for the consequences, as where, through the explosion of the permitted fireworks, personal injuries are suffered by, and death results to, a human being. (p. 715.)

Action to recover for the death of the plaintiff's intestate caused by the explosion of fireworks. Judgment for the defendant, which was affirmed by the appellate division of the supreme court of the first judicial department. Plaintiff appealed.

Charles Steckler and Levin L. Brown, for the appellant.

John L. Delany, corporation counsel, Theodore Connoly and Terence J. Farley, for the respondent.

51 VANN, J. The question presented by this appeal involves the liability of the defendant for an explosion of fireworks, which occurred on Madison avenue, adjoining Madison square, on the evening of election day, November 4, 1902, whereby eighteen persons were killed, including the plaintiff's intestate, and about two hundred injured.

The board of aldermen of the city of New York have power to "prevent encroachments upon and obstruction to the streets, and to authorize and require their removal by the proper officers." They "shall not have power," as the charter expressly provides, "to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the 52 erection or repairing of a building on a lot opposite the same": Revised Charter, Laws 1901, c. 446, sec. 50. They are authorized to pass ordinances for various purposes, and, among others, "in relation to the use of guns, pistols, firearms, firecrackers, fireworks and detonating works of all descriptions": Revised Charter, Laws 1901, c. 446, sec. 49. Pursuant to this authority sections 718 and 719 of the revised ordinances were passed, which provide in substance that no person shall fire, discharge or set off fireworks of any description within the limits of the city, under a penalty named for each violation.

In October, 1902, while these ordinances were in force, the board of aldermen adopted, and on the 27th of the same month the mayor approved, the following resolution: "Resolved, that the ordinances relating to the discharge of fireworks in the city of New York be, and the same are hereby, suspended so far as they may apply to meetings and parades of political parties or associations during the campaign of 1902; such suspension, however, to continue only until November 10, 1902, and be sub-

ject to such restrictions and safeguards as the police department may determine as necessary."

On the twenty-seventh day of October, 1902, a copy of this resolution was sent by the city clerk to the police commissioner and by him to all precincts and squads of the police department throughout the city, with a notice, officially signed, stating that "the following copy of a resolution of the board of aldermen is transmitted to you for your information and guidance."

The National Association of Democratic Clubs, a political organization, had a parade on the evening of November 4, 1902, and its officers arranged to have a display of fireworks on Madison avenue, between 23d and 25th streets, in connection therewith. Madison avenue at this point is a wide street, bounded on the west by Madison square, a park of seven acres, where, as well as in the adjoining streets, seventy-five thousand people assembled to receive the election returns and witness the parade. They stood closely crowded in the park and on both sides of Madison avenue. The fireworks, consisting of mortars, bombs, rockets and the like, were arranged in six [53] parallel rows in the middle and on the west side of the avenue, commencing about twelve feet from the curb. A police sergeant testified that they filled the middle of Madison avenue from 24th to 25th street. The bombs were fired from mortars made of steel tubing, and were of a kind that had been frequently used before, without serious results, so far as appeared. The fireworks were placed in the street in the presence of the police, who had been assigned to duty in the locality to the number of several hundred owing to the large crowd that was expected. While they did not superintend the arrangement of the fireworks in the street, they made no attempt to prevent it owing to the resolution of the board of aldermen.

Between 9 and 10 o'clock in the evening, as the parade was approaching Madison square, where thousands of people had assembled, some of the fireworks exploded from a cause not disclosed by the evidence, and the plaintiff's intestate, a young man about nineteen years of age, was killed. This action was brought by the administrator of his estate to recover the damages caused by his death, and the complaint is adapted to the theory of either negligence or nuisance. When first tried there was a verdict for the plaintiff, but the judgment was reversed on appeal by the appellate division: Landau v. City of New York, 90 App. Div. 50, 85 N. Y. Supp. 616. Upon the second trial the plaintiff was nonsuited and the appellate division affirmed by a divided vote whereupon he appealed to this court.

The law upon the subject of municipal liability for an explosion of fireworks in a public street varies radically in different jurisdictions, owing possibly to the presence or absence of large cities therein. In certain states the city is held not liable even when express permission is given by the common council, or pursuant to its authority: Hill v. Board of Aldermen, 72 N. C. 55, 21 Am. Rep. 451; Fifield v. Common Council, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430.

The law in our own state was established the other way by a decision of this court made upon careful consideration, after full argument by distinguished counsel, who cited the pertinent [54] authorities from all the states: Speir v. City of Brooklyn, 139 N. Y. 6, 36 Am. St. Rep. 664, 34 N. E. 727, 21 L. R. A. 641.

In that case it appeared that an ordinance of the common council of the city of Brooklyn after prohibiting the discharge of fireworks within the city limits, provided that it should not extend "to any fireworks exhibited by order of the common council, or by any exhibitor, who shall be authorized by a permit from the mayor to exhibit the same for public amusement." There was a display of fireworks of considerable magnitude at the junction of two narrow streets completely built upon, which was managed by private persons, under a permit obtained from the mayor and it resulted in the destruction of the plaintiff's house by fire. Under these circumstances "in view of the place, the danger involved and the occasion," it was held that "the transaction was an unreasonable, unwarranted and unlawful use of the streets, exposing persons and property to injury and was properly found to constitute a public nuisance." It was further held that as the permit was in fact authorized by an ordinance of the common council regulating a matter within its jurisdiction, the city was liable although the particular act authorized was unlawful. So it was decided in another case that a municipal corporation is liable for the consequences of an unlawful use of its streets, sanctioned by its permit: Cohen v. Mayor etc. of New York, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700, 4 L. R. A. 406. The only effect of such a permit is to make the city liable jointly with the licensee: Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Arthur v. City of Cohoes, 56 Hun, 36, 9 N. Y. Supp. 160, 134 N. Y. 589, 31 N. E. 628.

While a municipal corporation is not liable for the failure to pass ordinances prohibiting the discharge of fireworks in

the public streets, it is bound to exercise due care to keep its streets in a safe condition and is liable for permitting dangerous obstructions or nuisances therein. If an ordinance is passed in relation to the subject and it is not enforced, or is subsequently repealed, there is no liability for the repeal, or for the mere failure to enforce, but still the duty remains as to obstructions and nuisances. That duty never ceases and 55 it cannot be avoided by the passing of ordinances or the failure to pass them.

There is a distinction, well recognized by law, between the discharge of fireworks upon private property and in a public highway. There is also a distinction in this regard between highways, depending on their location, the extent of the traffic upon them and the danger involved in case of accident. Fireworks in certain streets may or may not be a nuisance, according to the circumstances, which usually present a question of fact. In the case now before us we have to do with a crowded street, near the center of the largest city on the continent, "where any misadvantage in managing the discharge would be likely to result in injury to persons or property."

Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found such as matter of fact. This was so adjudged in the Speir case, which is controlling in principle. While such displays are sometimes tolerated, they are not authorized, and whoever is responsible for them must run the risk of liability for the consequences, so far as they result in injury to person or property: Conklin v. Thompson, 29 Barb. 218; Jenne v. Sutton, 43 N. J. L. 257, 39 Am. Rep. 578; Little v. City of Madison, 42 Wis. 643, 24 Am. Rep. 435.

If the resolution of the board of aldermen was in substance and effect a license, or permit, which led to the exhibition in question, the city is liable for consenting in advance to the existence of a nuisance in its streets, provided a jury finds the facts as stated. The question of liability turns primarily on the meaning of the resolution, which is claimed by the plaintiff to be a license, and by the defendant a repeal.

The resolution contemplates the display of fireworks in the streets, for it applies to the parades of political parties, which must take place in the streets, for they cannot be held anywhere else. The ordinances were not repealed either in form or substance. The word "repeal" does not occur in the resolu-

tion and the ordinances remain in force as to [56] all persons and organizations, except political parties and associations when holding meetings or having parades. When the ordinances and the resolution are read together, as they must be in order to get at the meaning and intent, there is an absolute prohibition, with a suspension thereof as to certain associations for a limited period only. It did not apply to all persons, but to a comparatively small number and it was not for all time, but for about two weeks. If the suspension had been permanent and had applied to all persons, it might be held a repeal. It was not permanent, however, but was to continue only during the political campaign then in progress, and not beyond the early date named. It was neither total nor universal, but was in the nature of a substitute for a series of special permits to political parties, until after election. While it was called a suspension, it had the effect of a permit. The limitation as to time and persons shows its real nature, for a repeal is not confined to certain individuals during a single fortnight. It was affirmative and permissive in character, because it allowed the classes named to do the prohibited acts for a limited period. The apparent intent was to grant a permit, but avoid the appearance and responsibility. The actual intent may properly be gathered from the natural and expected effect of the action of the aldermen, which was tantamount to an invitation to do what was done. Their resolution was adapted to that end and, as we think, was adopted for that purpose. No purpose for passing it is suggested other than to permit those conducting parades to set off fireworks during that particular campaign. The use of the word "suspended" was an adroit conception, but it is at war with every other word in the resolution and should be construed accordingly. Mere form is not material, for the real meaning as gathered from the entire resolution must control. The subject of the resolution was the display of fireworks in public streets, which had previously been prohibited, but was henceforth permitted as to a limited number of persons for a limited period of time. No other intention than the one suggested can reasonably be imputed to the aldermen, [57] when their action is considered in connection with the circumstances existing at the time it was taken. The suspension as limited is practically a license, because it is personal and temporary. While the persons are not named, they are plainly designated, and although the places are not specified, all the streets of the city are opened to fireworks in connection with

parades. The resolution virtually authorized certain associations to discharge fireworks, with no restriction as to the kind, during the political campaign, then near its close, but not after the 10th of November, which shows that what was in fact done was in contemplation. That is the natural interpretation of the resolution and that is the way it was interpreted by the police and by the political club to which the fireworks belonged. As was said in the Speir case "when given and communicated to the police it was understood as preventing any police interference with the act permitted and it had that effect." If the aldermen did not mean this, what did they mean? What other reason was there for passing the resolution? What was to be accomplished by it, unless it authorized political parties to discharge fireworks during the campaign? Why was the suspension made "subject to such restrictions and safeguards as the police department" should regard as necessary? This precaution throws light on the intention. Displays of fireworks were expected as the result of the resolution and, hence, they were placed under police regulation. They were expected, because the resolution as interpreted by the aldermen themselves, permitted such displays, for clearly they could not be had without permission as it would be the duty of the police to prevent them.

As the purpose of the resolution was personal and temporary, and it was made subject to the restrictions and safeguards of the police department, we think it was a permit, and was intended as a permit. While permission did not make the display lawful, for the aldermen could not legalize a nuisance, it invited and led to it, as the jury could have found. Although the action of the board in granting the permit was beyond their powers, still, it bound the city, because it related to the 86 subject of fireworks, which was within their jurisdiction. They consented to the creation of a nuisance in the streets and thus placed the city under the same liability as if they had erected the nuisance themselves. They have no more right to authorize or permit a nuisance than to create one, but if they do either, they make the city liable for the damages directly caused by their action.

The nonsuit was improperly granted, as a case was made for the jury. The judgments below should be reversed and a new trial ordered, with costs to abide the event.

Cullen, C. J., Gray, Bartlett and Haight, JJ., concur.

O'Brien, J., dissents.

Werner, J., absent.

Judgments reversed, etc.

The Discharge of Fireworks at a suitable place in a city is not unlawful if not prohibited by statute or municipal regulations: Dowell v. Guthrie, 99 Mo. 653, 17 Am. St. Rep. 598. But see Speir v. Brooklyn, 139 N. Y. 6, 36 Am. St. Rep. 664. And it has been held that where a city suspends an ordinance forbidding the use of fireworks, it is not answerable for the destruction of a building caused by the negligent use of fireworks by boys: Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451. See, further, Wheeler v. Plymouth, 116 Ind. 158, 9 Am. St. Rep. 837; Lincoln v. Boston, 148 Mass. 578, 12 Am. St. Rep. 601.

KURZ v. DOERR.

[180 N. Y. 88, 72 N. E. 926.]

THE PRESUMPTION OF INNOCENCE is not Indulged in a Civil Action, though it is to recover for the doing of an alleged criminal act. (p. 719.)

APPELLATE PROCEDURE—Question for Review, When Need not be Specified.—Where an appellate division of a supreme court certifies that a question of law is involved which ought to be reviewed by the court of appeals, it need not certify what that question is. (p. 719.)

Leander B. Faber, for the appellant.

Stephen H. Voris, for the respondent.

89 BARTLETT, J. This action was to recover damages for an assault, committed by the defendant upon the plaintiff, by willfully and maliciously leveling a loaded firearm at him and discharging the same. The jury rendered a verdict for two hundred and fifty dollars.

This appeal presents a single question, based on an exception to the charge of the trial judge. The following is an extract from the record:

"Defendant's Counsel.—I ask your honor to charge that the burden is upon the plaintiff to prove by a preponderance of evidence that the defendant is guilty of an assault.

"The Court.—Yes, I charge that.

"Defendant's Counsel.—Also that the defendant is presumed innocent until he is proven guilty.

"The Court.—That presumption does not prevail here. It is a question of which one has presented to you a preponderance of the evidence; that is, Does the evidence in favor of the story told by the plaintiff outweigh the testimony which makes against that claim? What I mean by the weight of the evidence is the convincing force of the evidence as it appeals to your minds."

We are of opinion that the trial judge committed no error in refusing to charge that the defendant is presumed innocent until he is proven guilty.

The opinion of the learned appellate division to this effect, in which Mr. Justice Hirschberg carefully reviews the conflicting authorities in this state, meets with our approval and we adopt the same.

90 We would add nothing to this opinion were it not deemed advisable that this court should, by positive statement, set at rest the question that has been much discussed by the bar and in judicial opinions: Woodbeck v. Keller, 6 Cow. 118; Clark v. Dibble, 16 Wend. 601; Hopkins v. Smith, 3 Barb. 599; Johnson v. Agricultural Ins. Co., 25 Hun, 251; Wilcox v. Wilcox, 46 Hun, 32; Grant v. Riley, 15 App. Div. 190, 44 N. Y. Supp. 238; Seybolt v. New York etc. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; New York etc. Ferry Co. v. Moore, 18 Abb. N. C. 106, 102 N. Y. 667, 6 N. E. 293.

In Seybolt v. New York etc. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75, the action was for negligence resulting in the death of plaintiff's intestate. At the close of the case the defendant requested an instruction to the jury that "The burden of proof is on the plaintiff to establish the negligence of the defendant. If there is a reasonable doubt on the whole evidence as to the negligence of the defendant, the verdict should be for the defendant."

Chief Judge Ruger said (95 N. Y. 569, 47 Am. Rep. 75): "We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt. In criminal cases the law, out of tender regard for the rights of accused persons, and the presumption of innocence which always attaches to persons in that situation, gives to the defendant the benefit of any reasonable doubt existing as to his guilt; but in civil actions, unless the issue involves the commission of a crime by some of the parties thereto, the application of such a rule is, we think, unauthorized by the law of evi-

dence. It was held in the case of Johnson v. Agricultural Ins. Co., 25 Hun, 251, where the defendant had, in answer to an action upon a policy of insurance to recover damages for a loss occasioned by fire, alleged that the plaintiff had himself fired the insured buildings, that it was sufficient if the defense was supported by a preponderance of evidence, and that it was error to require the defense to be proved beyond a reasonable doubt. The question decided in [91] that case has been the subject of considerable controversy among authors upon evidence, and we do not intend to express any opinion thereon."

In New York etc. Ferry Co. v. Moore, 18 Abb. N. C. 106, 119, the plaintiff sought to recover of the defendant, its ticket agent in the ferry-house, moneys which it was alleged he had received in a fiduciary capacity and embezzled. Judge Earl, writing for this court, said: "In this case it is not for us to determine how satisfactory plaintiff's evidence was, but whether there was any evidence to sustain the judgment. . . . . There is no rule of law which requires a plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence always giving the defendant the benefit of the presumption of innocence." The words last quoted, "always giving the defendant the benefit of the presumption of innocence," have led to some confusion in the lower courts.

The presumption of innocence is not indulged in a civil action, as the plaintiff rests only under the burden of proving his case by a preponderance of evidence.

People v. Briggs, 114 N. Y. 56, 20 N. E. 820, was an action brought by the dairy commissioner, in the name of the people, to recover the penalty imposed by the act of 1885, "to prevent deception in the sale of dairy products": Laws 1885, c. 183. The legislature provided in this act that certain violations of it should subject the defendant to various penalties and other violations were declared to be misdemeanors.

The court was requested and declined to charge the jury that they must be satisfied beyond a reasonable doubt of the violation by the defendants before they could find against them, and charged that they might so find upon a preponderance of evidence; and exceptions were taken.

Judge Bradley, after reviewing the authorities, said: "We have examined the numerous reported cases of the several

states and England and the text-books cited by counsel, and 92 some other cases, upon this question, and think that in civil actions the rule that the preponderance of evidence is sufficient to warrant the finding of the fact in which is involved the charge of such character has the support of the better reason."

We deem it very important that the strict rule of evidence, applicable to the burden of proof in criminal cases, should not be extended to civil actions for the recovery of damages, where the defendant is charged, incidentally, with arson, embezzlement or any other crime.

When life or liberty is involved the proof must exclude reasonable doubt, but in a civil action, where a recovery of damages is sought against the wrongdoer, the plaintiff is only required to sustain his case by a preponderance of evidence.

The learned appellate division in its order granting leave to appeal to this court has submitted for our answer the following question: "Did the trial court err in refusing to charge the jury that the defendant is presumed innocent until proven guilty?"

This appeal is taken under section 191 of the Code of Civil Procedure, subdivision 2, which provides, in part, that no appeal shall be taken to this court from a judgment of affirmance rendered in an action to recover damages for a personal injury when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

The appellate division has, in this case, issued its certificate to that effect, and it is sufficient without specifying a question for review. It is only in appeals taken under section 190 of the code, subdivision 2, that questions are required to be certified: Young v. Fox, 155 N. Y. 615, 50 N. E. 279.

The judgment and order appealed from should be affirmed, with costs.

Cullen, C. J., Gray, O'Brien, Haight, Martin and Vann, JJ., concur.

Judgment affirmed.

In Civil Actions for damages, the better rule seems to be that the facts alleged need be proved by only a preponderance of the evidence, although they involve a criminal act. Some authorities, however, take the view that the same degree of proof is required to establish the cause of action as would warrant a conviction in a crimi-

nal prosecution: See Heiligmann v. Rose, 81 Tex. 222, 26 Am. St. Rep. 804, and cases cited in the cross-reference note thereto; Welch v. Jugenheimer, 56 Iowa, 11, 41 Am. Rep. 77; Barton v. Thompson, 46 Iowa, 30, 26 Am. Rep. 131, and cases cited in the cross-reference note thereto; Seybolt v. New York etc. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

KELLEY v. BUFFALO SAVINGS BANK.

[180 N. Y. 171, 72 N. E. 995.]

BANKS AND BANKING—Savings Bank—Care Which must be Exercised in Permitting the Withdrawal of Deposits.—The only practicable general rule to which savings banks can safely be held in permitting the withdrawal of deposits of deceased persons whose death is not known to such banks and whose pass-books are presented is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. (p. 724.)

BANKS AND BANKING—Savings Banks, What is Want of Due Care by in Paying Out Deposits.—If, when the pass-book of a deceased depositor is presented, though his death is unknown to the bank, it pays out deposits on checks when a critical examination of the signature on such checks and the signature of the deceased entered in the bank's signature-book would disclose that the signature on the checks were not genuine, and the officers of the bank make no critical examination or physical comparison of the signatures on the checks and that on its signature-books to ascertain the genuineness of the signatures on the checks or the identity of the person presenting them, the bank and its officers do not exercise ordinary care, and the representatives of the decedent may recover without regard to the withdrawals thus permitted, although there was no such difference between the signatures upon such checks and that on the signature-book as to create doubt or misgivings concerning the genuineness of the signatures on the checks in the mind of a competent and reasonably careful bank officer when presented with the bank-book by a person unknown to him. (pp. 726, 727.)

Action by the administratrix of Ellen Neville to recover certain deposits made by her commencing on the thirtieth day of July, 1871, when she was about eighteen or nineteen years of age. A bank-book was then issued to her and she signed her name in the signature-book kept by the bank for the purpose of identification. At the opening of the account there were certain rules adopted by the bank posted in a conspicuous place in its banking-room and printed in its book. The first of these provided that "the secretary will endeavor to prevent fraud, but all payments made to persons producing the deposit-books or duplicates thereof shall be good and valid payments to the depositors respectively." The second rule was that "on the decease of any depositor the amount standing to the credit of

the deceased shall be paid to his or her legal representatives when legally demanded." Ellen Neville died about December 1, 1878, at which time there remained to her credit eight hundred and eighty-four dollars and forty-three cents. During her lifetime she had made sixteen deposits to the credit of her account, and had presented her book to the bank fifteen times for the purpose of having interest credited thereon, and she had drawn two checks, one dated September 22, 1873, and the other July 7, 1877. She left surviving her, her mother and two sisters, to wit, Kate and Mary, the latter, as administratrix, bringing the present action, having been appointed as such May 22, 1901.

When Ellen died, her bank-book was in the house where the whole family lived and was taken possession of by her mother or by one of her sisters. After her death the bank-book was presented by the mother or the sister Kate on ten different occasions between January 1, 1875, and July 1, 1883, for the purpose of interest credited thereon. On the 4th of March, 1882, it was presented by some person unknown to the bank, but being either the mother or one of the sisters, and a deposit was made and entered therein. After Ellen's death, drafts or orders signed in her name were presented to and paid by the bank at various times, to wit, December 28, 1878; June 2, 1880; July 30, 1881; August 14th and September 1, 1883—which orders were in fact signed either by her mother or one of her sisters, but no part of the moneys represented by them was paid to her legal representative. The findings of the trial court respecting the conduct of the bank officers in making these payments were as follows:

"That by a critical examination and comparison of the said signatures on each of the aforesaid drafts or orders, with the true signature of said Ellen Neville, entered and signed as aforesaid in the book of signatures, it would have been apparent to a competent bank officer that neither of the signatures to said drafts or orders was the genuine signature of said Ellen Neville."

"That at the respective times at which such drafts or orders were presented to the defendant for payment, the defendant made no critical examination or physical comparison of the signatures thereon with that of the said Ellen Neville entered and signed in the book of signatures of depositors kept by the defendant aforesaid."

"That said drafts or orders were paid by defendant on presentation of the same with the pass-book, and the defendant made no effort by a critical examination or physical comparison to ascertain the genuineness of the signatures of any of said drafts or orders, or to ascertain the identity of the person presenting the same."

"That there does not exist such a disparity or difference between the signature of said Ellen Neville upon the signature-book of the defendant and the several signatures upon said five checks, or any or either of them, as to create doubt or misgiving concerning the genuineness of said five signatures, or any or either of them, in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bank-book, and, therefore, the defendant exercised due care and caution, and was not guilty of negligence in paying the five checks in question, nor in paying any or either of them."

The conclusion drawn from these findings by the trial court was that the complaint should be dismissed, and its judgment entered accordingly was unanimously affirmed by the appellate division.

Harry D. Williams, for the appellant.

Adolph Rebadow, for the respondent.

[176] WERNER, J. Upon the foregoing facts the trial court dismissed the complaint. At the appellate division the judgment entered upon that decision was unanimously affirmed. This court must, therefore, assume that every fact found is based upon sufficient evidence (Marden v. Dorthy, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694; Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; People v. Barker, 152 N. Y. 417, 46 N. E. 875), and the judgment must be sustained unless the conclusion of law upon which it is predicated is erroneous, or other fatal errors affect the rulings made upon the trial.

The immediate question presented by this appeal is whether, upon the record before us, the plaintiff is entitled to recover, and, as the decision of this question necessarily involves an inquiry into the duties and responsibilities of savings banks toward their depositors, the case is one of more than ordinary professional interest and practical importance. Savings banks are prominent factors in our modern business life. Many of them count their deposits by the millions and number their de-

positors by the thousands. Many, if not most, of these depositors are persons in the humbler walks of life, living in widely scattered sections of their respective communities, visiting the banks infrequently, having no personal acquaintance with bank officials or employés, and no convenient or satisfactory means of immediate identification when their identity is questioned. These conditions are in striking contrast with those which prevail in the intercourse between the officers and employés of discount banks and their patrons. The majority of the latter are persons actively engaged in business, making daily or at least frequent visits [177] to their respective banks. Their signatures are familiar to the officers and employés of the banks, and if, now and then, there is need of identification, it can usually be furnished without much difficulty. These considerations clearly indicate the difference between the two classes of banks, as well as the necessity for the law which permits savings banks to adopt reasonable rules adapted to the nature of their business, which rules, when properly adopted and promulgated, are binding upon them, their depositors and those who succeed to their interests. Outside of these special rules, however, there are many questions affecting the interests of savings banks and their depositors which must be determined by broad and comprehensive legal rules of general application. One of these questions arises out of the relations between savings banks and the legal representatives of deceased depositors. What degree of care must a savings bank exercise in paying money out of a depositor's account after his death, upon the production of his bank-book and the presentation of a draft purporting to bear his signature, when the bank has had no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact? That is the question which underlies all other questions in this case.

In view of what has been said concerning the relations of savings banks and their depositors toward each other, it becomes obvious that any general rule that would require savings banks to act in such circumstances at their peril, without regard to the degree of care exercised, would ultimately cast as great a burden upon depositors and their legal representatives as upon the banks, and would disastrously affect the beneficent work which such institutions are designed to accomplish. If it were the duty of savings banks to establish at all hazards the identity of every person presenting a depositor's bank book and draft, it would be quite as impossible for them to continue

business as it would be for some persons to avail themselves of the best known and most generally approved method of investing and accumulating the fruits of frugal and patient economy. The same would be true of any other rule [178] so onerous in its operation that such institutions could not do business without great inconvenience both to them and their depositors. A single illustration will suffice to demonstrate this. Take the case of a large savings bank with so many accounts that it is impossible for the paying teller to know each depositor. It would be utterly impracticable to do business if each application for a withdrawal of money had to be delayed until a searching inquiry could be made as to the regularity of the transaction. But even if such a course were possible, so far as the bank were concerned, what would be the effect upon the poor and unknown depositor whose place of residence may be remote from the banking-house and who may have no acquaintance with anyone who would be of the slightest assistance in identifying him? He would have no way of getting money that rightfully belonged to him, or, at least, might find his efforts in that direction so burdensome as to amount to the same thing. This is not an extreme illustration, but one that is fairly typical of the relations between great savings banks located in large centers of population with many depositors whose accounts are small and whose deposits are made at rare intervals. Upon reflection it becomes obvious, therefore, that the only practicable general rule to which savings banks can be safely held in such dealings is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. This is the rule that has been laid down by this court in a variety of similar cases: Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418; Appleby v. Erie Co. Sav. Bank, 62 N. Y. 12; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786.

In the case of Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314, the wife of a depositor had wrongfully secured possession of his pass-book, forged his signature to a draft and obtained payment from the bank. But there the bank had adopted a special by-law requiring it to use its best efforts to prevent fraud, and this was construed to bind the bank to a higher degree of care than that enjoined by the general rule.

It is to be observed that all of the cases above cited present [179] instances of payments to the wrong persons during the lifetime of the depositors, and it is true that in construing cer-

tain rules, so generally adopted by saving banks as to have acquired almost the binding force of statutes, it has been held by this court that there is a difference between the relations of a savings bank and a living depositor on the one hand, and the relations of such a bank and the legal representatives of a deceased depositor on the other hand.

The rules referred to are among the by-laws adopted and promulgated by the defendant bank, and are as follows: "The secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit-books, or duplicates thereof, shall be good and valid payments to the depositors respectively."

"On the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded."

In the recent case of Mahon v. South Brooklyn Sav. Inst., 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118, we had occasion to discuss the effect of these two rules, and as bearing upon the defense that the bank had exercised due diligence in paying out money upon the account of a deceasd depositor, we said: "The rule of diligence invoked by the defendant applies only to the case of a living depositor. When, through a depositor's carelessness, his bank-book gets into the hands of a third person who presents it to the bank, the latter may show its care and diligence in making payment to the person presenting the pass-book, and thus protect itself against a second demand for payment by the careless depositor. But the by-law which is designed to protect the bank in such a case must be read in connection with the other by-law, which provides that after the depositor's death payment must be made 'to his or her legal representatives.' This latter by-law is for the protection of the depositor who can no longer protect himself, and, therefore, the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." That case is now relied upon by the appellant. As 180 applied to the facts there established, the language just quoted was precise and correct, because the bank had knowledge of the depositor's death, and assumed to pay out the money credited to her account to one who claimed it by virtue of an alleged gift causa mortis, which the trial court found had never been made, and the unanimous affirmance of that finding of fact by the appellate division left this court no alternative but to apply the rule there laid down. In that case the find-

ing of fact clearly established the absence of ordinary care, and the decision reached by this court was the only logical sequence of the finding. The language of the opinion is general and comprehensive, but of that it is enough to say that judicial discussion is to be limited to what is actually decided: People v. State Board of Tax Commrs., 174 N. Y. 417, ante, p. 674, 67 N. E. 69, 63 L. R. A. 884.

In the case at bar the situation is different. While there is no direct finding to the effect that the officers of the respondent bank had no knowledge of Ellen Neville's death, that is the direct and inevitable implication of the other findings, and thus the question that remains to be discussed is whether the findings as to what the officers of the bank actually did support the legal conclusion that they were not guilty of negligence in making payments to the persons who presented the decedent's pass-book and drafts purporting to have been signed by her. The substance of the findings upon that subject is that a critical examination and comparison of the signatures on the several drafts referred to with the true signature of the decedent would have disclosed the fact that the signatures on the drafts were not genuine; that the officers of the bank made no critical examination, or physical comparison of the signatures on the drafts with the genuine signature of the decedent, entered and signed in the bank's signature-book. and that the officers of the bank made no effort by a critical examination, or physical comparison, to ascertain the genuineness of the signatures on the drafts, or to ascertain the identity of the person presenting the same. The use of the disjunctive "or" in these findings separates that portion of [181] them which relates to a critical examination of the signatures from that which relates to a physical comparison thereof, and fairly construed they import that no physical comparison of the signatures was made by the officers of the bank.

These two findings are not necessarily inconsistent with each other, but they are so divergent as to entitle the appellant to the benefit of the one most favorable to her: Redfield v. Redfield, 110 N. Y. 671, 18 N. E. 373. Whether the failure to make a physical comparison of the signatures in the case at bar was consistent with the exercise of ordinary care on the part of the defendant bank may depend upon peculiar facts which are not found in the record before us. The finding quoted in the foregoing statement of facts, to the effect that there was no such disparity or difference between the signature

of said Ellen Neville upon the signature-book of the defendant and the several signatures upon five checks as to create doubt or misgiving concerning the genuineness of said five signatures in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bank-book, and that therefore the bank exercised due care and caution and was not guilty of negligence is really a conclusion of law, and not a finding of fact.

It is possible that there may be special cases in which it may not be necessary for bank officers to make a physical comparison between one signature on file with a bank and another upon a draft or check presented to it for payment, but if so, there must exist some unusual and pertinent excuse that is not discoverable in the findings now before us tending to show that the failure to make such a comparison is not at variance with the requirements of ordinary care. We think the finding most favorable to the appellant, to wit, that the defendant made no physical comparison of the signatures upon the five drafts with the signature of Ellen Neville in the defendant's signature-book, does not support the conclusion of law to the effect that the complaint should be dismissed, and for that reason the judgment herein should be reversed.

This view of the case renders it unnecessary to pass upon [182] the exceptions to rulings that may not be repeated upon another trial, nor upon the extent of the appellant's rights in case she should recover a judgment and it should appear that, as one of the surviving sisters of Ellen Neville, she has already received a part of the fund which she now seeks to get in her representative capacity.

The judgment herein should be reversed and a new trial granted, with costs to abide the event.

VANN, J. I concur for reversal, but upon a more radical ground. While the defendant could have adopted a rule that would cover a payment made in good faith to a person in possession of the pass-book of a deceased depositor, it had not done so when the payments in question were made. As its rules then stood such a payment bound the depositor while he was alive, but did not bind his estate after he was dead, for they expressly provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." This

rule is absolute and a part of the contract. It is the law of the case made by the parties. The language is that of the bank and, hence, if ambiguous, is to be construed in favor of the depositor, who is not responsible for the ambiguity. If we add to it in effect the proviso "but payment to one presenting the pass-book of a deceased depositor shall be good unless the bank has notice of the death," we make a new contract. I repeat as applicable to the case in hand what we recently said in another case: "This latter by-law is for the protection of the depositor who can no longer protect himself, and, therefore, the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril": Mahon v. South Brooklyn Sav. Inst., 175 N. Y. 69, 72, 96 Am. St. Rep. 603, 67 N. E. 118.

Cullen, C. J., O'Brien, Bartlett, Haight and Martin, JJ. (and Vann, J., in result in memorandum), concur with Werner, J.

Judgment reversed, etc.

DUTIES OF SAVINGS BANKS TO THEIR DEPOSITORS.

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I. Scope of Note.

In this note we shall consider only the substantive law relating to the subject of the note. And in our consideration of the subject we shall exclude a consideration of those duties which are common to all banks and confine the discussion to such duties as are peculiar to savings banks. We shall also exclude from our consideration the liability of stockholders, directors or trustees of such banks to the depositors therein.

II. General Nature of Savings Banks.

In a general way a savings bank may be said to be an institution for receiving and investing savings and paying interest on the savings so deposited at stated intervals, the interest being dependent as to rate on the bank's profit from loaning the deposits. The statutes in the various states have modified or enlarged the scope of such banks to some extent, but the fundamental idea of such banks remain the same.

In Lewis v. Lynn Inst. for Sav., 148 Mass. 235, 12 Am. St. Rep. 535, 19 N. E. 365, 1 L. R. A. 785, the court observed with respect to the general nature of such institutions that the general object of such institutions is to combine small amounts for the purpose of making the combined deposits more available for advantageous investment, and that the fund is held by the bank for the security of the depositors. And, although the bank may accumulate a reserve fund to meet possible losses, its main purpose is as an agency for managing the moneys of the depositors, but that it does not make any absolute promise to repay to any depositor the full amount of his deposit, at all events. See Bunnell v. Collinsville Sav. Soc., 38 Conn. 203, 9 Am. Rep. 380, to the same effect.

Or, in other words, the principal features of savings banks are that they offer safe security with small interest, with no profit to the managers, as contradistinguished from a larger rate of interest and less security. The managers of such institutions occupy the position of holders of a public trust of a benevolent and charitable nature, and it is their duty to preserve and foster the object of that trust with a reasonable zeal: See Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 Atl. 543, where the authorities to this effect are collected.

But a bank which allows a stated rate of interest on deposits is not a savings bank in the sense that the directors are trustees and sustain a relation of trust and confidence toward the trustees: Colorado Sav. Bank v. Evans, 12 Colo. App. 334, 56 Pac. 981. And whether a bank is a savings bank does not depend upon its designation, but upon its functions: State v. Lincoln Sav. Bank, 14 Lea, 42.

But it must also be remembered that the earlier idea as to such banks, namely, that the bank was merely a trustee for the depositors and that the relation of debtor and creditor did not exist between the bank and its depositors, has, as a general rule, been modified by statutory enactments, under which savings banks possess a capital stock. This changed condition, due to statutory regulations, was shown in Los Angeles v. Loan etc. Co., 109 Cal. 396, 42 Pac. 149, where the court, after adverting to the statute, said: "It is therefore apparent that a deposit in a savings bank having a capital stock may be a debt against the corporation, and indeed must be, since the corporation is formed by the stockholders, and the depositor deals with the corporation, not as his agent, for whose mistakes or defalcations he is responsible, but as a principal pledging its stock and assets for the security of the depositor. Not so, however, with the savings banks of the other class which has no capital stock, and in which the depositors are members of the corporation." In this connection, see, also, Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090, 37 L. R. A. 619.

III. Right of Savings Banks to Formulate By-laws, Rules or Regulations With Respect to Mode of Conducting Business.

The mere right of savings banks to formulate by-laws, rules or regulations, both for its own protection and that of its depositors, does not seem to be disputed, and, on the contrary, the right to do so seems to be assumed by the cases which adjudicate the rights arising under them. Undoubtedly the right to promulgate such by-laws or rules is, as a general rule, provided for in the charters of the savings banks. The reason for such precautions was shown in Farmer v. Manhattan Savings Inst., 60 Hun, 462, 15 N. Y. Supp. 235, where it was said that the reason for a rule respecting the presentation of the deposit-book on the withdrawal of the deposit is for the protection of the bank against the carelessness of the depositor, while a rule requiring the payment of the deposit to the legal representative of the depositor is for the protection of the depositor who can no longer protect himself.

IV. How Adoption of By-laws may be Shown.

The adoption of rules, regulations or conditions respecting the relation between a savings bank and its depositors may be shown by their long use with the knowledge and approval of the trustees, as well as by proof of a formal vote of the directors or trustees: Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

V. Necessity for By-laws, Rules or Regulations to have been Assented to by Depositors.

A depositor must have knowledge of a by-law and have assented to it, either actually or impliedly, in order to be bound by it: Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090, 37 L. R. A. 619. The requirements of a general statute under which a savings bank is organized, that all deposits shall be paid to the depositor or his legal representatives, cannot be changed by a by-law adopted by the bank, unless the attention of the depositor has been called to it, and he, actually or impliedly, assented to it: Ackenhausen v. People's Sav. Bank, 110 Mich. 175, 64 Am. St. Rep. 338, 68 N. W. 118, 33 L. R. A. 408.

VI. How Such Assent may be Shown.

The assent to by-laws may be implied even though the by-laws require depositors to subscribe a certain book: Gifford v. Rutland Sav. Bank, 63 Vt. 108, 25 Am. St. Rep. 744, 21 Atl. 340. The signature of a depositor to the book containing the rules and regulations is not the only method by which he may be bound. The agreement may be evidenced by his conduct, such as by leaving his deposit at the bank after obtaining a pass-book containing the rules and regulations: Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288. But in this connection see Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090, 37 L. R. A. 619, where an agree-

ment printed at the head of the signature-book and also printed in the pass-book, was held not binding, though depositor signed the signature-book, where it was not shown that he so signed with intention to assent to it, or that he signed the agreement which was printed in the pass-book.

But a depositor in a savings bank who accepted from the bank and used a pass-book containing printed regulations relating to the liability of the bank for the payment of the deposit to others than the depositor, was held in Chase v. Waterbury Sav. Bank, 77 Conn. 295, 59 Atl. 37, to have assented to the regulation.

In Warhus v. Bowery Sav. Bank, 21 N. Y. 543, the rule that the depositor would be charged with notice of a regulation printed in English and signed by him, was applied as against the administrator of an intestate who was a German, having but a slight knowledge of the English language.

VII. By-laws, Rules or Regulations as Part of the Contract of Deposit.

Where the depositor, on making his first deposit in a savings bank, signed an agreement to be bound by the by-laws printed in the pass-book given him, the by-laws become a material part of the contract of deposit: Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; Ferguson v. Harlem Sav. Bank, 43 Misc. Rep. 10, 86 N. Y. Supp. 825; Warhus v. Bowery Sav. Bank, 21 N. Y. 543; Cosgrove v. Provident Inst. for Sav., 64 N. J. L. 653, 46 Atl. 617.

The above rule is applied in the majority of the adjudicated cases, since a great majority of the cases involving the right to recover a deposit in a savings bank turn upon the construction or compliance with some by-law, rule or regulation regarding such deposits.

In Smith v. Brooklyn Sav. Bank, 101 N. Y. 58; 54 Am. Rep. 653, 4 N. E. 123, the by-law printed in the pass-book declares: "All payments made by the bank upon the presentation of the pass-book and duly entered therein will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book." The court held that two modes of payment were contemplated, both of which required the presentation of the pass-book as the condition thereof, one authorizing payment to the depositor personally and the other payments made in his absence; but that when made in his absence, it required the depositor's written order accompanying the pass-book.

So, also, it has been held that a clause in a pass-book reading, "Depositors are alone responsible for the safekeeping of the book and the proper withdrawal of their money. No withdrawal will be allowed without the book, and the book is the order for the withdrawal," must be taken to have been made part of the contract between the depositor and the bank, entitling the bank to the production of the book upon demand of the deposit: Heath v. Ports-

mouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194. Likewise the fact that the depositor was illiterate and could not read the rules in the pass-book delivered to him does not excuse him from their binding force where they are reasonable rules: Burrill v. Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669. See, also, Donlan v. Provident Inst., 127 Mass. 183, 34 Am. Rep. 358.

VIII. Effect of Amendment of By-laws or of New Rules upon Rights of Depositors.

Although a depositor signs a deposit-book assenting to the by-laws then in force and "those which may be thereafter made pursuant to the power granted in the third article," which provided for further by-laws or alterations, and that "all such by-laws and alterations shall be equally binding on all depositors as those by them subscribed, after the same shall have been duly made known," a by-law adopted after the deposit was made, and not made known or attempted to be made known to the depositor, does not bind the depositor: Hudson v. Roxbury Inst. for Sav., 176 Mass. 522, 57 N. E. 1021. And where a depositor in a savings bank agreed in writing to be bound by the by-laws, and the pass-book contained a copy of the by-laws, one of which gave the trustees power to alter or amend them, the court held that his right to recover money paid by the bank to a third person on forged order was to be determined by the by-laws in force when he made his first deposit, and not by subsequent by-laws of which he had no notice, no matter whether the deposit was made before or after the passage of the late by-law, and that a provision of the statute that deposits may be withdrawn at such time and in such manner as the by-laws direct do not make the late by-law a part of the contract of deposit: Kimins v. Boston etc. Sav. Bank, 141 Mass. 33, 55 Am. Rep. 441, 6 N. E. 242.

And a rule forbidding any gift of a deposit except by assignment in writing acknowledged does not bind one who became a depositor before the rule was made, though the depositor had agreed that notices as to deposits or depositors should be deemed as personal notices when published by placards in the bank, and the rule respecting gifts had been placarded in the bank many years before the death of the depositor: Ranney v. Bowery Sav. Bank, 39 Misc. Rep. 301, 79 N. Y. Supp. 487.

IX. Necessity for Existence of By-laws to be Shown.

There is no presumption that a savings bank has a rule requiring notice before withdrawing a deposit: Weld v. Eliot Five Cents Sav. Bank, 158 Mass. 339, 33 N. E. 519.

X. Necessity for By-laws to be Reasonable.

The general rule of law is that by-laws of a corporation must be reasonable and consistent with law, or that they will be void: See monographic note to People's etc. Bank v. Superior Court, 43 Am. St.

Rep. 153. We do not apprehend that any different rule applies to savings banks: See Langdale v. Citizens' Bank, 121 Ga. 105, 104 Am. St. Rep. 94, 48 S. E. 708; Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 48 Pac. 1090, 37 L. R. A. 619. In Mechanics' etc. Bank v. Smith, 19 Johns. 115, which, however, does not appear to have been a savings bank, a by-law or rule of the bank that all payments made or received must be examined at the time was held not to prevent the recovery of money received on deposit, but not properly entered on the deposit-book of the depositor.

XI. Duty of Savings Banks as Dependent upon Nature of the Deposit.

a. **Ordinary Deposits.**—With respect to an ordinary deposit the contract between a savings bank and its depositor, in the absence of any by-law or rule limiting the bank's liability, is the ordinary one of debtor and creditor: Robinson v. Aird, 43 Fla. 30, 29 South. 633: Ladd v. Androscoggin County Sav. Bank, 96 Me. 520, 58 L. R. A. 288, 52 Atl. 1016; Donlan v. Provident Inst. for Sav., 127 Mass. 183. 34 Am. Rep. 358; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 10 Am. St. Rep. 479, 21 N. E. 172, 4 L. R. A. 145; Zinn v. Mendel, 9 W. Va. 580. In Lund v. Seaman's Bank, 37 Barb. 129, the claim of a depositor against a savings bank for his deposit was said to be a chose in action and not a bailment.

So, also, if a corporation organized as a savings bank and having a capital stock receives deposits which, under the by-laws, consist of two classes, one payable six months after demand, and the other at longer or shorter periods after demand, depending upon the amount to be withdrawn, the depositors receiving such interest as the board of directors determine, and the remaining profits belonging to the stockholders, the relation of debtor and creditor exists between the corporation and its depositors. But, of course, the relation of a savings bank to its depositors may, under some circumstances, be in the nature of a trust, as where it is so defined by its act of incorporation: Dodd v. Una, 40 N. J. Eq. 672, 5 Atl. 155. And it was said in a recent case in New Jersey that the depositors in a savings institution occupy a double relation to the corporation as such; that in case of insolvency, they are its creditors; while in other cases, they are in the nature of partners or stockholders, but in all cases they are the cestuis que trustent of the managers: Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 Atl. 543.

A person delivering money at the counter of a savings bank to one of its officers, who has apparent or ostensible authority to receive it, is not required to ascertain whether the board of directors has given express authority to such officer to receive the deposit: Burnell v. San Francisco Sav. Union, 136 Cal. 499, 69 Pac. 144.

And a commercial bank which receives the assets of a savings bank and assumes its liabilities can, of course, be held liable for the

repayment of its deposits: Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Green v. Odd Fellows' etc. Bank, 65 Cal. 71, 2 Pac. 887.

b. **Special Deposits.**—If one goes to a savings bank with money, stating that he wishes to have it loaned on a real estate mortgage, and the banker undertakes to so loan it when an opportunity offers, but it is turned over to the cashier of the bank and mingled with other money, and a pass-book issued showing the deposit of the money in the savings department of the bank, this is not a special deposit, though the banker was told that the money was to be left with him until it could be loaned, and that he should take care of it until he could loan it on a real estate mortgage: Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904.

A special depositor in a savings bank whose deposit draws interest is, in the event of the insolvency of the institution, entitled to be paid in full both principal and interest, before any distribution is made to regular and ordinary depositors, who are stockholders in the institution: Heironimus v. Sweeney, 83 Md. 146, 55 Am. St. Rep. 333, 34 Atl. 823, 33 L. R. A. 99. And where a deposit made by a wife in a savings bank is marked "special" and she testifies she told the bank to pay it to no one but herself, a payment to the husband, presenting her pass-book, on his assurance that he was her authorized agent, will be sufficient to warrant a finding of want of diligence on part of the bank: Clark v. Saugerties Sav. Bank, 62 Hun, 346, 17 N. Y. Supp. 215. And where a savings bank takes a depositor's money as a special deposit and converts it, the bank will be estopped from denying liability to repay, notwithstanding the receipt of the money was ultra vires: Abbott v. Wolfeborough Sav. Bank, 68 N. H. 290, 38 Atl. 1050. But in Riley v. Albany Sav. Bank, 36 Hun, 513; affirmed in 103 N. Y. 669, three persons presented themselves at the savings bank and desired to make a deposit for an aged, illiterate woman, subject to withdrawal only when the three persons would be present; the teller assented, though it appears it was the duty of the president to arrange for deposits out of the ordinary. The parties received the regulation pass-book. The court held that the bank was not bound by the verbal agreement. Justice Bockes filed a vigorous dissenting opinion.

c. **Joint Deposits or to the Survivor.**—Considerable litigation has arisen over the right to withdraw joint deposits, especially after the death of one of the parties. The real question in such controversies is generally the ownership of the fund as distinguished from the mere right to withdraw it from the bank, although the bank, as a general rule, when advised of the controversy, refuses to pay the deposit until the right to the fund is settled, although in many instances it will be observed that they have in some instances paid the deposit to one of the parties, shown on their books to be entitled to withdraw the deposit. It seems that most of such deposits are placed in that form as a matter of convenience to save

the expense and delay occasioned by administration proceedings. Hence, the question whether a gift, either inter vivos or causa mortis, was intended is frequently the main contention. As a general rule, such joint deposits are made by adding a near relative or devoted friend as the other party to the deposit.

The general rule with respect to such deposits was very ably reviewed by the California supreme court in Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390, wherein the court said: "What has been said in the opinion in Denigan v. Hibernia Sav. etc. Soc., 127 Cal. 137, 59 Pac. 389, in reference to the proposition that by the deposit Ellen made a gift to her husband is applicable here. As therein shown, there is nothing, aside from the form in which the deposit account was opened, to show any intention on her part to part with her interest in the money, or to establish any of the elements of a completed gift. The only difference between the forms of the deposits in the two cases is that in the present case the account was opened in the name of 'Francis and Ellen Denigan, payable to either,' whereas in the other case, the account and pass-book were entitled 'Frank Denigan or Ellen Denigan in account with the Hibernia Savings and Loan Society.' This difference in the form of the deposit or of the account does not, however, change the rule governing the rights of the parties to the money deposited. At the time of the deposit in each case the money was the separate property of Ellen, and, in the absence of any evidence tending to show a purpose or intention on her part to part with the title, it remained her separate property at the time of her death, notwithstanding its deposit in this form. The burden was upon the plaintiff to show that it had ceased to be her separate property, and, in the absence of any evidence tending thereto, his claim must be denied. In Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486, the deposit stood upon the books of the bank, 'Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either.' The money was the property of Joseph Henry at the time it was deposited, and upon his death his sister Margaret claimed it by virtue of this form of the account. The court held that she was not entitled to it, saying: 'The whole question depends upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank-book, and all the circumstances surrounding the deceased at the time'; and after holding that the words, 'and the survivor of them,' did not import a gift, said: 'Here the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus retained the power to draw out the money, the deceased did not devest himself of dominion and control over the fund. He could have drawn out every dollar after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that

the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the supposed gift of the brother; and the only evidence relied on to support the factum of the supposed gift is the form of the entry in the bank-book. But as will be observed, there are no terms in the entry that import of themselves an actual present donation by the brother to the sister, and the dominion retained by the brother over the fund enabled him to displace and utterly destroy all power conferred upon the sister in respect to the fund.'

The same principle was afterward maintained in Gorman v. Gorman, 87 Md. 338, 39 Atl. 1038. In Schick v. Grote, 42 N. J. Eq. 352, 7 Atl. 852, a deposit had been made in the following form: 'Bank for savings in account with August Grote and wife, Elvina, or either.' The money was the property of Mr. Grote, and after his death it was claimed in a suit for the same by his wife that by depositing it in this form he had made her a gift of it. The court held otherwise, saying: 'The form of the account in which the deposit was made is not evidence of gift to the wife.' In Noyes v. Newburyport Sav. Inst., 164 Mass. 583, 49 Am. St. Rep. 484, 42 N. E. 103, it was held that a deposit by Annie M. Pike, under an account headed 'Annie M. Pike and Mary L. Hewett, payable to either or the survivor,' remained the property of the original depositor, and that after her death her executors were entitled to the same. The cases cited by the respondent do not contravene the rule held in the above cases. In Mack v. Mechanics' etc. Bank, 50 Hun, 477, 3 N. Y. Supp. 441, cited by him, there was testimony before the court tending to show that after the deposit had been made the depositor came to the bank with his mother, and had the account changed to their joint names, and afterward made a gift of the deposit to her. In Metropolitan Sav. Bank, 82 Md. 314, 51 Am. St. Rep. 473, 33 Atl. 640, 31 L. R. A. 454, the only question presented for determination was the liability of the bank on its contract. At the time the deposit was made there was written at the head of the account in the bank-book, at the request of the depositor, an agreement that at the death of either the balance should belong to the survivor. After his death the bank paid the balance to the other. In an action by his executors against the bank to recover the deposit, judgment was given in favor of the bank upon the ground that in making the payment to the survivor, the bank had merely carried out its contract, and could not be required to pay the same again.

"The respondents claim that Francis became vested with Ellen's title to the deposit by virtue of his survivorship is equally untenable. Title by survivorship exists only when the estate is held in joint ownership, and unless the deposit was owned by Francis in the lifetime of Ellen, jointly with her, there was no joint interest

therein to which the incident of survivorship could attach. We have seen that she did not part with her title to the deposit by reason of the form in which it was made, and, as the title of Francis depends entirely thereon, it is evident that he had no joint interest with her in the moneys so deposited. Joint interests or estates are such as are acquired at the same time and by the same title."

In Gorman v. Gorman, 87 Md. 338, 39 Atl. 1038, the entry of the deposit in the book was, "Theresa McConnell and her niece, Maggie S. Gorman, joint owners; payable to the order of either or the survivor." The money belonged to the first named, and was changed upon the books of the bank into this form at her request. The court held that notwithstanding the use of the words "joint owners," the deposit did not become the property of both.

So, also, where the deposit was made in the name of Catherine Maroney and John Maloney, payable to either, or the survivor, and John had no knowledge of that fact until after the death of Catherine, the court held the entry did not amount to a gift, although she had while sick sent for him to come and get the book, which he did not do: Woonsocket Inst. for Sav. v. Heffernan, 20 R. I. 308, 38 Atl. 949. And where the money is deposited in the joint name of the depositor and another and there is written in the bank-books, "either party to draw, and in case of death of either of them the survivor shall have full power to withdraw the deposit as if the same had been duly transferred to such survivors," it was held not to amount to a gift, the court saying with reference to the entry, that: "It is a mere right to draw the money that is conferred. There is nothing to show that if the defendant drew the money he could keep it as his own, and without such words, no title by way of gift could pass": Flanagan v. Nash, 185 Pa. St. 41, 39 Atl. 818. And where money was deposited by the husband in his own name and that of his wife, "to be drawn by either," and both signed the signature-book, the pass-book being given to the husband, it was held that on the husband's death, the wife was no creditor of the bank, she having been merely an agent without a beneficial interest: Brown v. Brown, 23 Barb. 565. So, also, a deposit in the husband's name with the words "Payable to M. J. H.," his wife, were held not to import a completed gift, but merely an intention to give: Kennebec Sav. Bank v. Fogg, 83 Me. 374, 22 Atl. 251. The mere fact that a pass-book is made out in the name of "James Burke or wife, Bridget," does not prove the ownership of James Burke in the deposit, but evidences a purpose that the money may be drawn out by either: Burke v. Slattery, 10 Misc. Rep. 754, 31 N. Y. Supp. 825. And in Wetherow v. Lord, 41 App. Div. 413, 48 N. Y. Supp. 778, it was said that though money deposited in the joint names of a husband and wife and owned by each equally is payable on the draft of either party, still one of them cannot make a valid gift of more than his

interest in the deposit, even though he could have individually drawn out the whole deposit.

But where a savings deposit is in the joint names of a mother and son, and the intent appears to create a joint tenancy, the survivor takes title to the entire fund, irrespective of whether he even had possession of the pass-book: Farrelly v. Emigrant Indus. Sav. Bank, 92 App. Div. 529, 87 N. Y. Supp. 54, affirmed in 179 N. Y. 594, 72 N. E. 1141. In the case just cited, the mother gave the pass-book to her sister to be delivered to her son, whose whereabouts were unknown: See, also, Matter of Barefield, 36 Misc. Rep. 745, 74 N. Y. Supp. 472. And where at the head of a deposit account in the name of a husband and his wife, it was written: "It is agreed that this account is opened subject to the by-laws printed on the first and last pages of this book, subject to the order of either, the balance, at the death of either to belong to the survivor," the agreement being written at the request of the husband and agreed to by the bank, it was held that it constituted an agreement between the bank and the husband, which remains in force after his death, and justifies the payment to her, as survivor, of the moneys remaining on deposit at his death: Metropolitan Sav. Bank v. Murphy, 82 Md. 314, 33 Atl. 640, 31 L. R. A. 454. In Matter of Bolin, 136 N. Y. 177, 32 N. E. 626, the court said: "That the moneys were deposited to the account of 'Julia Cody or daughter Bridget Bolin' is not a fact from which any inference of a transfer or of a gift arises. In the absence of other evidence, the transaction simply evidenced a purpose of the depositor of the moneys that they should be drawn out by either of the persons named. The only presumption would be that the depositor so arranged for the purposes of convenience, and that presumption is rather strengthened by the facts appearing of her helpless condition of blindness and of other infirmities."

A joint deposit to the order of either or the survivor, the person making the deposit retaining the pass-book, does not amount to a valid gift inter vivos, nor does it operate as a testamentary disposition, but if the person who made the deposit delivers the pass-book to the other person with intent to give the deposit to such person, it will transfer the deposit: Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208. And where a deposit was made in the names of "Diedrick or George Grafing," the money belonging to the former, a savings bank is protected in paying it to Diedrick's executor on the presentation of the pass-book and testamentary letters, where George had never made any claim to the deposit up to that time, and had never deposited nor withdrew any money nor had possession of the pass-book: Grafing v. Irving Sav. Inst., 69 App. Div. 566, 74 N. Y. Supp. 741, 75 N. Y. Supp. 48. The facts in Mulcahey v. Emigrant Indus. Sav. Bank, 89 N. Y. 435, were somewhat complicated. The deposit was entitled "In account with John O'Keefe or Ellen Mulcahey," both of the parties being present at the time of opening the account and both contributing to it, but

to what extent was not shown. O'Keefe died while in possession of the pass-book and Mrs. Mulcahey informed the bank "not to give her money to Mrs. O'Keefe when she should come with the bank-book," but the bank paid the deposit to her upon presenting the pass-book and letters of administration. A rule printed in the pass-book provided that all payments to persons producing the pass-book shall be valid payments to discharge the bank. The court said: "The right of the bank thus to pay, and of each depositor to demand payment, was not, we think, terminated by the death of O'Keefe. The authority O'Keefe had was coupled with an interest, and vested on his death in his personal representative. The bank agreed in substance to pay to either depositor, on the production of the pass-book. The several character of its obligation was not transformed by the death of O'Keefe into an obligation to pay to the survivor alone. But when the bank had notice that the fund belonged to the plaintiff, and was prohibited by her from paying it to the representatives of O'Keefe, it could not thereafter justify a payment to the latter under the original authority, or by reason of the rule in the pass-book, if the money of right, or between the plaintiff and the estate of O'Keefe, belonged to the former. The case was a proper one for an interpleader, in which the rights of the respective claimants could be judicially ascertained."

In this connection, see, also, the subdivision respecting claims to deposits on the ground of being gifts.

d. **Deposits in Trust for Another.**—The practice of placing deposits "in trust for" a third person is quite prevalent, and until recently the law respecting the effect of such deposits was not well settled. In determining their effect it is well to consider their purposes. Such deposits may be made in that form for reasons connected with taxation; for the purpose of technically complying with rules of the bank limiting the amount of individual deposits; for the purpose of obtaining higher rates of interest, where there is a discrimination based on the amount of a deposit; for the purpose of concealing from others knowledge of the depositor's real pecuniary condition, and for the purpose of making a future gift to the cestui que trust. The latter purpose seems to have been the original purpose of such deposits.

The doctrine of the earlier cases seems to have been that the act of a depositor in opening an account in a savings bank in trust for a third person, the depositor retaining possession of the pass-book and failing to notify the beneficiary, created a trust if the depositor died before the beneficiary, leaving the trust account open and unexplained: Cunningham v. Davenport, 147 N. Y. 43, 49 Am. St. Rep. 641, 41 N. E. 412, 32 L. R. A. 373.

The court of appeals of New York, in a very recent case, in which the subject was very thoroughly considered, laid down what will probably be deemed the correct rule on account of the leading char-

acter of the courts of that state in the establishment of the rules of law respecting savings banks. The rule there announced was that a deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime, by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor: Matter of Totten, 179 N. Y. 112, 71 N. E. 748. The court in its discussion of the subject reviewed Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446, Willis v. Smyth, 91 N. Y. 297, Mabie v. Bailey, 95 N. Y. 206, Beaver v. Beaver, 117 N. Y. 421, 18 Am. St. Rep. 531, 22 N. E. 940, 6 L. R. A. 403, Matter of Bolin, 136 N. Y. 177, 32 N. E. 626, Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116, Cunningham v. Davenport, 147 N. Y. 43, 49 Am. St. Rep. 641, 41 N. E. 412, 32 L. R. A. 373, Barefield v. Rosell, 177 N. Y. 387, 101 Am. St. Rep. 814, 69 N. E. 732, Haux v. Dry Dock Sav. Inst., 154 N. Y. 736, 49 N. E. 1097, Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808, Washington v. Bank for Savings, 171 N. Y. 166, 89 Am. St. Rep. 800, 63 N. E. 831, Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed in 173 N. Y. 626, 66 N. E. 1115, in which the subject of such deposits were passed upon.

In a decision in the appellate division of New York, rendered since the decision in Matter of Totten, just referred to, the court held that where prior to the opening of a savings account by one Ann Coote "in trust for Margaret Brown," the said Ann Coote had declared it to be her intention that the account and money should be for the benefit of Margaret Brown, and that she did not want her husband (Coote) to get it, an irrevocable trust in the deposit was created in favor of said Margaret Brown: O'Brien v. Williamsburg Sav. Bank, 101 App. Div. 108, 92 N. Y. Supp. 908. The rule followed by the Massachusetts courts, which pass frequently on questions involving the rights of depositors in savings banks, was announced by Justice Holmes in Parkman v. Suffolk Sav. Bank, 151 Mass. 218, 24 N. E. 43, where it was held that the fact that the savings bank book designates the depositor as the trustee for another is not conclusive of the existence of the trust, and adverting to the well-known practice of people who have deposited in their own names the full amount allowed, opening new accounts ostensibly as trustees for others, but in fact for their own benefit, it was held that evidence that the depositor had deposited the full amount previous to opening the trust account was admissible for the purpose of offering a possible explanation that the form of the deposit was not intended as a gift.

But in a comparatively recent case in Maryland, that of Milholland v. Whalen, 89 Md. 212, 43 Atl. 43, 44 L. R. A. 205, it was held that a deposit "in trust for herself and M., joint owners, subject to the order of either, the balance at the death of either to belong to the survivor," the depositor retaining the pass-book and subsequently withdrawing part of the money, constituted a complete and irrevocable trust, regardless of whether the fact of the deposit was communicated to the beneficiary or not. The court in assigning reasons for its decision, said: "It is the donor's act which originates the trust and it is the intention with which he does the act that is material. The entry, unexplained, is a sufficient declaration of trust because it indicates an intention to establish a trust; but this may be rebutted. Possession by the depositor of the bank-book in no way detracts from the force of the entry, because it is a possession by the trustee and does not denote that no beneficial interest had been given to the cestui que trust."

Although the courts frequently pass upon the rights to such trust deposits, we do not understand that a bank cannot by its by-laws, rules, or regulations determine the manner in which it will repay such deposits to the person making it. The terms of the trust would seem to be a matter wholly between the trustee and cestui que trust. Its contract is merely to return the money to the trustee without becoming responsible for the sins of commission or omission of the trustee: See Boone v. Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498.

But where the bank is advised that there is a controversy respecting the right to the deposit, it seems that it is not justified in paying the deposit to the trustee: McCarthy v. Provident Inst. for Sav., 159 Mass. 527, 34 N. E. 1073.

On the general subject of the rights of the respective parties to such trust deposits, see Cauhape v. Security Sav. Bank, 127 Cal. 197, 59 Pac. 589; Eagle etc. Co. v. Belcher, 89 Ga. 218, 15 S. E. 482; Robinson v. Ring, 72 Me. 140, 39 Am. Rep. 308; Northrop v. Hale, 72 Me. 275; Blasdel v. Locke, 52 N. H. 238; Bartlett v. Remington, 58 N. H. 364.

e. **Deposits in Name of Another or Under an Assumed Name.**—If A deposits money in the name of B without informing the bank of that fact, and B, obtaining possession of the pass-book, draws a part of the money so deposited, the bank in the absence of bad faith or negligence is not liable: Arkofsky v. State Sav. Bank, 91 Minn. 440, 103 Am. St. Rep. 519, 98 N. W. 326. In this connection, see, also, Howard v. Windham County Sav. Bank, 40 Vt. 597, where a deposit was entered in the name of another with intention to make a gift of the deposit.

Under a law providing that money deposited in name of a minor may be paid to the person making the deposit, the bank cannot pay to the father amounts deposited by the minor, but may pay sums

deposited by the father: Dickinson v. Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12. In this connection see, also, Ficken v. Emigrants' Indus. Sav. Bank, 33 Misc. Rep. 92, 67 N. Y. Supp. 143.

So, also, where a father deposited a sum of money in a savings bank in his name and a like sum in his daughter's name, though for his own use, and retained the pass-book. The court held, that after his death, the daughter could not recover, notwithstanding by-laws of the bank provided that depositor and his legal representatives should be bound by the conditions annexed to the deposit, designating the name of the person for whose benefit it was made: Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222. See, also, Kennebec Sav. Bank v. Fogg, 83 Me. 374, 22 Atl. 251.

Even though the name of a depositor was an assumed name, the bank is not justified in refusing to pay the deposit where his identity is shown by possession of the pass-book, and an affidavit of the fact concerning his identity: Davenport v. Savings Bank, 36 Hun, 303. In People v. Third Ave. Sav. Bank, 98 N. Y. 661, it appeared that one Vail, who was described as "a man generally in trouble, a thief, a miser and a penurious, miserable member of human society," made a deposit in 1869 under the name of Seaman, giving his age, occupation and residence. In 1872 he was sentenced to the state prison, and about three years thereafter died. The bank, however, paid the deposit to a person who presented a deposit-book apparently issued in the name of Seaman, and containing a duplicate of the bank account and items in the deposit-book. The person presenting the pass-book answered the test questions correctly. The teller compared the signatures, and believing them to resemble each other sufficiently, paid the accrued dividends to the party. The court held that the bank was justified in making the payment.

On the general subject of deposits in the name of another, but having reference more particularly to commercial banks, consult Honig v. Pacific Bank, 73 Cal. 464, 15 Pac. 58; Armstrong v. Johnson, 93 Mo. App. 49, 67 S. W. 736; People v. State Bank, 36 Hun, 607; Bates v. First Nat. Bank, 89 N. Y. 286; Kerr v. People's Bank, 158 Pa. St. 305, 27 Atl. 963; Brown v. Daugherty, 120 Fed. 526.

XII. Nature and Character of the Pass-book.

a. Question Whether the Pass-book is Negotiable.—A savings bank pass-book is not a mere pass-book or statement of an account; it is issued to the person in whose name the deposit is made and with whom the bank has made its contract of deposit; it is the depositor's voucher, and the only security which he has evidencing the amount of his credit at the bank: Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208. It has also been described as an account kept between the bank and the depositor showing the business transactions of the parties with each other. But it is also said that it is not of itself a negotiable instrument, nor could any mere agreement of the parties have the effect to invest it with that character

in a commercial sense. It is not different from the account of a merchant or tradesman kept in the same way: Witte v. Vincenot, 43 Cal. 325. So, also, it is asserted that it is not a negotiable paper, and that its possession constitutes in itself no evidence of a right to draw money thereon; that it merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to repay them at such times and in such manner as he may direct, subject to such by-laws to which he has assented: Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653, 4 N. E. 123; Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786. But the courts uniformly assert that a savings bank pass-book is not a negotiable instrument: Eaves v. People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59; McCaskill v. Connecticut Sav. Bank, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737; Mills v. Albany Ex. Sav. Bank, 28 Misc. Rep. 251, 59 N. Y. Supp. 149; Allen v. Williamsburgh Sav. Bank, 69 N. Y. 317; Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 643, 39 Atl. 336. But a purchaser of it, to whom such a book is delivered, obtains an equitable title to the fund which it represents, as also does a donee of the book: Pierce v. Boston etc. Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371. Indeed the weight of authority supports the proposition that a gift of savings bank deposits by delivery of the pass-book is a valid and complete gift of the money represented by it: See Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208, citing Camp's Appeal, 36 Conn. 88; Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 231; Ridden v. Thrall, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. 627, 11 L. R. A. 684; Penfield v. Thayer, 2 E. D. Smith, 305; Tillinghast v. Wheaton, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126.

b. **Distinction Between Savings Bank Pass-book, Commercial Bank Pass-book and Certificates of Deposit.**—From what has been said with respect to the nature of savings bank pass-books, it will be seen that the main difference between such pass-books and those issued by regular banks of discount is that in the commercial banks the deposit cannot be transferred by a delivery of the pass-book because wherever the book may be, the depositor may withdraw the fund by check, and the possession of the pass-book does not affect the depositor's dominion and control of the deposit: Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

Though pass-books were characterized in Wegner v. Second Ward Sav. Bank, 76 Wis. 243, 44 N. W. 1096, as in the nature of a certificate of deposit, still there is no analogy between such pass-books and certificates of deposit from the very nature of the banks and the instruments in question.

The purpose of the certificate issued by a commercial bank is to enable the person receiving it to obtain credit in the public markets and carry his funds safely to remote places, whereas such pass-books are not issued for such purposes, but merely to put the

account between the depositor and the bank in a convenient form: McCaskill v. Connecticut Sav. Bank, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737.

c. **Effect of Entries in Pass-book.**—The entries upon the pass-book and books of a savings bank are not conclusive evidence of the ownership of a deposit in the bank: Kennebec Sav. Bank v. Fogg, 83 Me. 374, 22 Atl. 251. Hence an entry by a teller of the amount of a deposit in the pass-book, being the act only of the agent of the bank and not the parties, is said that if the depositor can prove that there was a mistake in the entry, he may recover, in an action for money had and received, the sum not credited, regardless of a by-law or rule of the bank that all payments made and received must be examined at the time: Mechanics' etc. Bank v. Smith, 19 Johns. 115. And accordingly a savings bank is not estopped from proving that a pass-book issued by it was procured by depositing a forged check and obtaining credit for the amount of such check, even though the holder of the pass-book has assigned it or given an order on the bank for the amount to an innocent person who has paid value in good faith: McCaskill v. Commercial Sav. Bank, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568, 13 L. R. A. 737. As sustaining these general principles, see the cases in subdivision XI, c, where the ownership of joint deposits was allowed to be shown regardless of the form of the entry in the pass-book. But with respect to commercial banks, it has been held that the entry of the amount and date of a deposit in a pass-book, made by the proper officers, binds the bank as an admission, and that it is generally conclusive as an account stated when the pass-book is balanced: Wasson v. Lamb, 120 Ind. 514, 16 Am. St. Rep. 342, 22 N. E. 729, 6 L. R. A. 191. In this general connection see, also, Hepburn v. Citizens' Bank, 2 La. Ann. 1007, 46 Am. Dec. 564; Union Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 181; First Nat. Bank v. Mason, 95 Pa. St. 113, 40 Am. Rep. 632.

We do not apprehend that the rule would be any different with reference to savings banks.

XIII. Duty of Savings Banks with Respect to the Repayment of Deposits.

a. **In General.**—In a general way, it may be said that money deposited in a savings bank can be legally demanded and received from the bank only by the depositor or his attorney, or in case of his death, by his executor or administrator: Eaves v. People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59. And where the depositor becomes insane, payment on a genuine order by the depositor, without notice by the bank of the insanity of the depositor, is a valid payment: Riley v. Albany Sav. Bank, 36 Hun, 513, affirmed in 103 N. Y. 669.

b. **Duty to Exercise Ordinary Care and Diligence.**—In the principal case it was said that the only practical general rule to which sav-

ings banks can be safely held in dealing with its depositors is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case.

So, also, it is said that in the absence of any rule assented to by its customers, a savings bank is to be governed by the same legal principles which apply to other moneyed institutions. And where it has prescribed rules and its depositors have assented to them, the extent of its duty is to a certain extent measured by the rules which it has prescribed. But in a general way it may be asserted that it is bound to exercise reasonable care and diligence, which will be a question of law or fact, dependent upon the conclusive or inconclusive character of the proofs offered: Allen v. Williamsburgh Sav. Bank, 69 N. Y. 320. As a general rule, the respective duties of the bank and its depositors toward each other are defined by by-laws, rules or regulations, as remarked before, but the promulgation of such by-laws, rules or regulations does not relieve the bank from its general duty to exercise ordinary care to prevent the payment of the deposit to the wrong person: Chase v. Waterbury Sav. Bank, 77 Conn. 295, 59 Atl. 37; Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 171. Frequently a by-law will state that while the bank will endeavor to prevent fraud and imposition, yet all payments made to persons presenting the pass-book will be valid payments to discharge the bank; but it is held that notwithstanding such a by-law, the bank is bound to exercise ordinary care and diligence in ascertaining the identity or authority of the person presenting the pass-book Kimmel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786. And the same rule obtains even though the by-laws warn the depositor that "the institution will not be responsible for loss sustained when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation": Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336. In short, the bank cannot relieve itself from the duty to use reasonable care and diligence in making payments on deposits by any rule or regulation: Sullivan v. Lewiston Inst. for Sav., 56 Me. 507, 96 Am. Dec. 500; Ackenhausen v. People's Sav. Bank, 110 Mich. 175, 64 Am. St. Rep. 338, 68 N. W. 118; Levy v. Franklin Sav. Bank, 117 Mass. 448; Smith v. Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653, 4 N. E. 123.

c. **Effect of Suspicious Facts or Circumstances.**—From what has been said in the preceding section, it can be readily seen that payment to a person not entitled to receive the deposit, though he is in possession of the pass-book, will not discharge the bank if at the time of payment a fact or circumstance was brought to the knowledge of the bank officials calculated to excite the suspicion and inquiry of an ordinarily careful person and they failed to make inquiry or exercise at least ordinary care and diligence: Gearns v. Bowery Sav. Bank, 135 N. Y. 557, 32 N. E. 249; Appleby v. Erie

County Sav. Bank, 62 N. Y. 12. Hence a rule of a savings bank that the pass-book shall be the voucher of the depositor and that its presentation shall be sufficient authority to make payment to the bearer does not relieve the bank from liability for paying the deposit to an impostor where any fact or circumstance existed which put the bank upon inquiry: Geitelsohn v. Citizens' Sav. Bank, 17 Misc. Rep. 547. In the case just cited it was held that the fact that the depositor had never before withdrawn such a large amount, or ever had withdrawn the whole deposit was not a suspicious circumstance, since it is the right of a depositor to withdraw his whole deposit at any time without question. The rule was illustrated in Allen v. Williamsburgh Sav. Bank, 69 N. Y. 317, where a by-law printed in the pass-book stated: "The bank will use its best efforts to prevent fraud, but all payments made to persons producing the deposit-book shall be deemed good and valid payments." The depositor's wife wrongfully obtained possession of the pass-book and presented it with a forged check or order for two thousand eight hundred and fifty dollars. There was a difference between the signature and that on file with the bank. Another rule permitted the depositor to withdraw his deposit personally by order in writing if the bank had his signature on its signature-book and by letter of attorney, duly authenticated. The bank attempted to justify its payment on the ground of the production of the book, but the court observed that when a person of one sex produces the deposit-book issued to one of another sex, it should arrest the attention or excite the inquiry of the bank.

d. Necessity to Use Most Improved System of Banking.—In Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288, the court observed that methods of business and means adopted for preventing mistakes in 1868, which might have been reasonably careful and prudent then, would not necessarily be so a quarter of a century later, when improved methods of doing business and devices for saving time and preventing mistakes have been generally adopted.

e. Duty to Identify Withdrawing Depositors.

1. In General.—A provision in by-laws, signed by the depositors, that "the bank will not be responsible for frauds committed on the officers by producing the pass-book and drawing money without the knowledge or consent of the owner," does not discharge the bank from the obligation to exercise ordinary care to identify the person presenting the pass-book: Saling v. German Sav. Bank, 15 Daly, 386, 7 N. Y. Supp. 642. But a by-law governing the relations of a savings bank with its depositors, which states as the reason for its existence the fact that its officers may be unable to identify every depositor doing business with it, is not applicable to cases where the officers would be able to protect the interests of its depositors by the exercise of reasonable care and diligence: Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

2. **Necessity to have Aids to Identification at Hand.**—In Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288, just cited, the bank did not have the signature of the depositor on its signature-book, and had not instituted the card system for the preservation of such signatures and incidental test questions. It had received an order for the payment of a part of the deposit at one time, but did not have the signature appended to that order placed where it was accessible. It had over six millions of dollars on deposit and over twelve thousand depositors. The court held the bank to be negligent in not having some means at hand to aid in the identification of its depositors and to prevent false impersonations by swindlers. The court also observed: "It is no answer that the first deposit was sent by mail or by messenger because it is perfectly easy to obtain by mail the signature of all depositors who can write, even if they do not come personally to the bank. And if, for any reason, this cannot be done, then other proof of identity should be required besides the possession of the book, even if the depositor is put to some inconvenience thereby. But in this case the bank had in its possession the genuine signature of the plaintiff. It would have been very easy to have attached that order to some book, or so filed it that it could be readily referred to whenever a person not known to the officers at the bank claimed to be a depositor and demanded a payment upon his account."

3. **Duty to Compare Signature on Receipt or Order with Signature on File.**—Where a rule of the banks provides that "Every effort will be made to protect depositors against fraud, but payment made to a person presenting pass-book shall be good and valid on account of the owner, unless the pass-book has been lost and notice in writing given to the bank before such payment," a payment on a forged order bearing a signature similar to that of the depositor, accompanied by the pass-book, will discharge the bank where there was nothing to arouse the suspicion of the teller or put him upon inquiry, as a reasonably prudent man, that the signature was forged. And under such circumstances the court refused to hold that it was the duty of the teller to compare the signature on the order with that on file in the bank: Langdale v. Citizens' Bank, 121 Ga. 105, 104 Am. St. Rep. 94, 48 S. E. 708. But if a comparison by the officers of the signature of an impostor, presenting a pass-book, with the genuine signature on file in the bank, would prevent the fraudulent imposition, then payment without comparison and without requiring proof of identity other than possession of the pass-book is no defense, even though a by-law authorizes payment to the holder of the pass-book: Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288. But the question whether the signature on the forged receipt or order was so variant from that on file with the bank, so that a comparison would have put the bank officials upon

inquiry, is said to be a question of fact for the jury: Kummel v. Germania Sav. Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786. It was held in Hager v. Buffalo Sav. Bank, 10 Misc. Rep. 455, 31 N. Y. Supp. 448, that where a thief presents a stolen pass-book with an order or check in the depositor's name, and the signature is so variant from that of the depositor's that the teller compared it with the signature on file, but paid the order without requiring identification, a finding of negligence on the part of the bank would not be disturbed.

4. Duty to Propound Test Questions Where Signatures are Variant or Depositor is Illiterate.—From what was said in the preceding section it would appear that where the signature on the order and signature on file are variant, it is the duty of the bank to propound test questions or use such other methods of identification as are available.

In Ferguson v. Harlem Sav. Bank, 43 Misc. Rep. 10, 86 N. Y. Supp. 825, a person presented a forged order. The teller, noticing a few irregularities in the signature, had his suspicions aroused and asked all the test questions for identification, all of which were answered correctly. The bank was held justified in paying the deposit. See, also, Hales v. Seaman's Bank, 28 App. Div. 407, 51 N. Y. Supp. 140. And in Geitelsohn v. Citizens' Sav. Bank, 17 Misc. Rep. 574, 40 N. Y. Supp. 662, it was said where the person presenting a stolen pass-book answered the test questions, the depositor being illiterate, the bank has shown due care in ascertaining the depositor's identity. In Wall v. Emigrant Indus. Sav. Bank, 64 Hun, 249, 19 N. Y. Supp. 194, the teller observed slight irregularities in the signature when compared to that filed over eleven years before with the bank, but the person readily answered three out of eight test questions—namely, the county in Ireland where the depositor was born, name of vessel on which he came over, and the maiden name of the depositor's mother, the other five questions not being asked. The court said that the bank had used reasonable care in paying the deposit. And in Gifford v. Rutland Sav. Bank, 63 Vt. 108, 25 Am. St. Rep. 744, 21 Atl. 340, 11 L. R. A. 794, the brother of the depositor, neither being known at the bank, presented the pass-book, representing himself as the depositor. In answer to questions put to him he correctly stated that the deposit was made by letter from a third person. In signing the depositor's name he formed an initial so badly that it caused comment from the president of the institution, but he was paid the deposit. A by-law required notice of loss of a pass-book to be given. It was held that the bank had used reasonable care.

A false personator signing by his mark was discussed in Rosen v. State Bank, 32 Misc. Rep. 231, 65 N. Y. Supp. 666. He presented the pass-book, but in signing by his mark failed to make a mark similar to the one made by the depositor on the signature-book. The

bank informed him of that fact, whereupon he went out and returned with a third person, who identified him as a depositor, or as the depositor, the evidence not being clear on that point. His supposed place of business was only a few blocks distant, but no efforts were made to ascertain the real facts. The court was of the opinion that "the course of the bank, under all the circumstances, was not an exercise of such a degree of care and intelligence as it was called upon to exercise."

5. **Duty to Identify cannot be Shifted by Payment with Check to Order of the Depositor.**—The payment by a savings bank of the deposit to an impostor by giving him a check upon a commercial bank does not shift the responsibility of passing upon the identity of the payee of the check: Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

f. **Rule Respecting Lost or Stolen Pass-books.**—Many of the phases of identification which we have discussed in the preceding sections apply to this subdivision. As a general rule savings banks have by-laws or rules providing that the bank will not be liable for a loss sustained where the depositor has not given notice that his pass-book has been lost or stolen, and the payment by the bank is made upon the presentation of the pass-book. Such by-laws are held to be reasonable: Gifford v. Rutland Sav. Bank, 63 Vt. 108, 25 Am. St. Rep. 744, 21 Atl. 340, 11 L. R. A. 794. So, also, a rule that the pass-book must be produced or its loss established by due search is reasonable: Warhus v. Bowery Sav. Bank, 21 N. Y. 543.

But under a by-law requiring the loss of the pass-book to be proved to the satisfaction of the trustees or treasurer, the test of whether the book has been lost or not is not the arbitrary decision of the trustees or treasurer, but the mind of a reasonable man: Webber v. Cambridgeport Sav. Bank, 186 Mass. 314, 71 N. E. 567. And payment on forged orders to a person presenting a lost pass-book cannot be justified under a by-law declaring that "as the officers of this institution may be unable to identify every depositor transacting business at the bank, the institution will not be responsible for the loss sustained where the depositors have not given notice that their books have been stolen or lost, if the sums of money entered in such book shall have been paid in whole or in part on presentation of said book." The effect of such a by-law is only to avoid loss to come by the inability of the officers of the bank to identify the depositor: Kingsley v. Whitman Sav. Bank, 182 Mass. 252, 94 Am. St. Rep. 650, 65 N. E. 161.

And under a statute which provided that depositors shall be repaid after demand under such regulations as the board of trustees shall prescribe, which regulations shall be put in some conspicuous place where business is transacted and also printed in the pass-books, by-laws which respectively provided that "on making the first de-

posit each depositor shall be required to subscribe his name in the signature-book, thereby signifying assent to the by-laws," and "that all payments made to persons producing deposit-books issued by the bank shall be deemed valid payments to the depositors respectively," were held not to exempt the bank from payment to a person preventing stolen pass-books unless shown affirmatively that the bank had complied with the statute: Kress v. Eastside Sav. Bank, 66 Hun, 635, 21 N. Y. Supp. 652.

It naturally is difficult to lay down any rule as to how soon after a pass-book is stolen notice of the fact should be given, for the reason that the fact of its having been stolen may not become known to the owner until the thief has withdrawn the deposit. But it would appear quite reasonable that the depositor should notify the bank as soon as he has discovered his loss, regardless of when the book got out of his possession. In Wegner v. Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096, the depositor was shot by the man who stole his pass-book and remained helpless until the next day. The bank paid the money on the same day that he was shot and before he discovered the loss of the book. His failure to notify the bank of the theft was held not negligence.

But a by-law requiring a depositor to give notice of his pass-book being lost or stolen does not relieve the officers of the bank from exercising such care and diligence as would be reasonable under all the circumstances of the case in order to protect the interests of the depositor and prevent payment to an impostor: Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288; Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; Gifford v. Rutland Sav. Bank, 63 Vt. 108, 25 Am. St. Rep. 744, 21 Atl. 340. Under such rules, a bank is not liable for paying the deposit to a stranger on a forged order with the pass-book, where there is nothing to arouse the suspicion of the teller that the stranger is not the depositor: Langdale v. Citizens' Bank, 121 Ga. 105, 104 Am. St. Rep. 94, 48 S. E. 708.

And likewise under a rule which stated that the bank would endeavor to prevent fraud upon depositors, yet that possession of the pass-book would be sufficient to warrant payment, it is held that where a stolen pass-book is presented with a forged receipt and the signature is compared with the depositor's signature, and is not so dissimilar as to be readily discovered by a person competent to hold the position of teller, that the bank is not liable: Appleby v. Erie County Sav. Bank, 62 N. Y. 12.

But the question whether the bank was negligent in paying a deposit on the presentation of a stolen pass-book is ordinarily one of fact for the jury: Eagle etc. Co. v. Belcher, 89 Ga. 218, 15 S. E. 482; Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

g. Rule Where Forged Order or Receipt is Presented.

1. **In General.**—A distinction seems to exist as between payments to one who falsely personates the depositor in presenting a lost or stolen pass-book and one who falsely claims to act under an authorization from the depositor: Kimins v. Boston Five Cents Sav. Bank, 141 Mass. 33, 55 Am. Rep. 441, 6 N. E. 242.

Perhaps the majority of the controversies respecting payment on forged orders arise in cases where the person wrongfully in possession of the pass-book personates the depositor. For a discussion of those cases see subdivisions XIII, e and f.

In Kingsley v. Whitman Sav. Bank, 182 Mass. 252, 94 Am. St. Rep. 650, 65 N. E. 161, the payment appears to have been made on a forged authority. In that case the court held that the effect of a by-law declaring that: "As the officers of this institution may be unable to identify every depositor transacting business at the bank, the institution will not be responsible for the loss sustained where the depositors have not given notice that their books have been stolen or lost, if the sums of money entered in such book shall have been paid in whole or in part on presentation of said book," was only to avoid loss to come by the inability of the officers of the bank to identify the depositor. So, also, in Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418, the deposit was paid to a stranger upon the strength of an order purporting to have been signed by the depositor. There appears to have been considerable doubt whether the signature was really forged. The rules, however, provided that all payments made to any person presenting the pass-book shall be deemed valid payments to the depositor. The pass-book was presented with the order by the stranger. The court held that the bank was not liable. But in Eaves v. People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59, it was said that ordinarily a payment by a savings bank to a person presenting a forged order and the bank-book of a depositor is no defense to an action brought by the depositor to recover from the bank the amount so paid by it. But there was no by-law in that case providing that the presentation of the pass-book would be sufficient authority for the payment of the deposit. The court also observed that a forged power of attorney was no power of attorney at all.

In Winter v. Williamsburgh Sav. Bank, 68 App. Div. 193, 74 N. Y. Supp. 140, one of the rules of the bank, printed in the pass-book, provided that: "All payments made to persons producing the deposit-book, whether with or without an order or letter of attorney, purporting to be signed by the depositor, shall be deemed good and valid payments to depositors respectively, and discharge the bank therefrom. Depositors alone are responsible for the safekeeping of their books and the proper withdrawal of money. No withdrawals will be allowed without the book, and the book is the order of with-

drawal." A man, whom depositor shortly afterward married, obtained possession of her pass-book and informed her that he lost it. She did not inform the bank of the loss. He presented raised orders to the bank with the book. The bank was held not liable.

It would seem that with respect to payments to persons not representing themselves to be the depositor and obtaining the payment upon the strength of an order purporting to be signed by the depositor, that the same rules would apply as are applicable to commercial banks with respect to forged checks, in the absence of any by-laws, rules or regulations specifically touching such payments.

2. **Effect Where Order or Power of Attorney is Defective on Its Face.**—Where the by-laws require that absent depositors can only withdraw their deposits on their order or check properly witnessed, the bank is liable for a payment on a forged check not witnessed: People's Sav. Bank v. Cupps, 91 Pa. St. 315. In this connection see, also, Langdale v. Citizens' Bank, 121 Ga. 105, 104 Am. St. Rep. 94, 48 S. E. 708. A power of attorney to draw money from a savings bank, the party describing himself in the body of the instrument as executor of the estate owning the deposit, giving number of bank-book, but signed as an individual, confers no authority on the bank to pay the money to the attorney, even though the by-laws authorized payment to a person presenting the pass-book: Gearns v. Bowery Sav. Bank, 135 N. Y. 557, 32 N. E. 249.

h. **Rule Where Deposit is Claimed as a Gift from the Depositor.**—Many of the cases affecting this question were discussed in subdivision XI, especially those cases involving gifts inter vivos.

Of course a depositor may dispose of his deposit by gift, notwithstanding various rules of the bank: Gammond v. Bowery Sav. Bank, 15 Daly, 483, 8 N. Y. Supp. 856. And the gift of the deposit appears to become a completed gift by the delivery of the pass-book: Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; Wetherow v. Lord, 41 App. Div. 413, 58 N. Y. Supp. 778. Many of the cases on this subject are not controversies between the donee and the bank, but between the donee and other claimants to the fund: See Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; Knight v. Tripp, 121 Cal. 674, 54 Pac. 267; McNamara v. McDonald, 69 Conn. 484, 61 Am. St. Rep. 48, 38 Atl. 54. Sometimes the bank is made a party to the litigation. Thus, in Denigan v. Hibernia Sav. etc. Soc., 127 Cal. 137, 59 Pac. 389, the deposit, which was separate property of the wife, was entered in name of "Frank Denigan or Ellen Denigan." It was claimed that the money was a gift to the husband. The court said: "The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time as she might need it, and it should not be held that she intended to part with her title thereto by reason of an am-

biguous phrase which is quite consistent with a contrary purpose: Matter of Ward, 2 Redf. 251; Orr v. McGregor, 43 Hun, 528; Shuttleworth v. Winter, 55 N. Y. 624; Marshall v. Crutwell, L. R. 20 Eq. 328; Beaver v. Beaver, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. 940; Matter of Bolin, 136 N. Y. 177, 32 N. E. 626; Flanagan v. Nash, 185 Pa. St. 41, 39 Atl. 818. When the claim of a gift is not asserted until after the death of the alleged donor it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift: Depuy v. Stevens, 37 App. Div. 293, 55 N. Y. Supp. 810; Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208." In this general connection see, also, O'Brien v. Elmira Sav. Bank, 99 App. Div. 76, 91 N. Y. Supp. 364, where the depositor, during her fatal illness, directed the bank, in writing, to "Let Mrs. Margaret Peckham sign the signature-book and change my account, so that she or myself can draw the money on deposit in your bank." The account was changed to read "or," and Mrs. Peckham signed the signature-book. Subsequently to the death of the original depositor, the bank paid the deposit to Mrs. Peckham. A rule of the bank provided that "all payments made to persons producing the pass-book shall be deemed good and valid payments to the depositors respectively, and shall discharge the bank from any further liability." The court held that the money belonged to Mrs. Peckham as a gift causa mortis, but that if it had actually belonged to the depositor's estate the rule would not have protected the bank from liability to the depositor's administrator.

Thus it will be seen from the very nature of such gifts that it is not always advisable for a bank to pay a deposit upon an assertion of the donee of a gift. Of course the transfer of the deposit could easily be made in such a manner as to come within the rules of the bank respecting transfers of deposits. The case of Fairfield Sav. Bank v. Small, 90 Me. 546, 38 Atl. 551, arose over a controversy respecting the ownership of a deposit. The bank sought to end the controversy by commencing a suit in equity requiring the claimants to interplead their claims of ownership. It seems that where a savings bank, with knowledge of the death of a depositor, pays the deposit to the holder of the pass-book in reliance on affidavits submitted to its counsel, tending to show that the deposit had been given to the holder of the pass-book, the bank, in an action against it respecting the ownership of the deposit, stands upon the holder of the pass-book's title: Podmore v. South Brooklyn Sav. Inst., 48 App. Div. 218, 62 N. Y. Supp. 961.

In Foss v. Lowell Five Cents Sav. Bank, 111 Mass. 285, the delivery of the pass-book and an order by the mother to the daughter was held to constitute a valid gift inter vivos, and that the bank being notified of the gift, it constituted a complete assignment of her right to the fund, but it was also said that the assignee could not sue the

bank at law in her own name unless the bank expressly promised to pay the amount to her, but that the assignment gave her the right to sue in the name of the assignor.

i. **Rule Where Depositor is Dead.**—The by-laws respecting the repayment of the deposit apply with equal force to the legal representatives of the depositor: Donlan v. Provident Inst. for Sav., 127 Mass. 183, 34 Am. Rep. 669. A savings bank paying out moneys of a deceased depositor to a person not entitled thereto cannot be exempted from liability on the ground that it exercised due care, nor because its by-laws provided that all payments made to persons producing a pass-book shall be valid payments to discharge the institution, for this by-law must be read in connection with another one declaring that after a depositor's death, payment must be made to his or her legal representatives since the last by-law is made for the protection of the depositor, who can no longer protect himself: Mahon v. South Brooklyn Sav. Inst., 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118; Farmer v. Manhattan Sav. Inst., 60 Hun, 462, 15 N. Y. Supp. 235.

An administrator may recover the deposit, even though the passbook is withheld by the depositor's family, notwithstanding a rule requiring its production: Palmer v. Providence Sav. Inst., 14 R. I. 68, 51 Am. Rep. 341.

In Hoffman v. Union Dime Sav. Inst., 41 Misc. Rep. 517, 85 N. Y. Supp. 16, the depositor gave a power of attorney to deposit and withdraw her funds. The depositor died, and the attorney in fact withdrew her deposit after her death. The administrator sued the bank, which defended on the ground that one of its by-laws stated, "Payments to persons producing the deposit-book, whether with or without an order or letter of attorney, purporting to be signed by the depositor, shall be deemed good and valid payments." But the court held that the power of attorney became revoked eo instanti upon the death of the depositor, and, secondly, that inasmuch as another by-law provided that "on the decease of any depositor the amount standing to the credit of the deseased shall be paid to his or her legal representatives," the bank was bound to see that the payment is made to the legal representatives. If, however, the power of attorney was coupled with such an interest in the attorney as would cause it to survive the depositor's death, the rule would be different.

On the general subject see, also, Foss v. Lowell Five Cents Sav. Bank, 111 Mass. 285, and Appeal of Knorr, 89 Pa. St. 93.

j. **Rule Where Administration is had on a Depositor Who is not Dead.**—A depositor who is not dead, but who was absent seven years without being heard from, may recover from the bank his deposit which was paid to a person appointed as his administrator under the belief that he was dead, even though the administrator produced

his pass-book, and notwithstanding that a by-law provided that "the institution will not be responsible for loss sustained where a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentment," since the demand for payment was not as depositor, but as administrator of the depositor, and on the presentation of his letters of administration, and the bank paid the deposit to the administrator in his alleged legal capacity. Nor has a by-law, providing "that on the death of the depositor, the money standing to his credit shall be paid to his legatee or heir at law or legal representative," any application, since the depositor was not dead: Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87. It would seem, however, that a by-law or rule could be formulated, which, when assented to by the depositor, would validate a payment of the deposit under such circumstances.

k. **Rule Where Deposit is Garnisheed.**—It seems that deposits in savings banks are liable to attachment or garnishment in the same manner as in a commercial bank: Nichols v. Schofield, 2 R. I. 123. The rule was recognized in the following cases where the ownership of the deposit was a subject of controversy: Preston v. Brennan, 135 Cal. 55, 66 Pac. 981; Kingman v. Perkins, 105 Mass. 111; Taft v. Bowker, 132 Mass. 277; Commonwealth v. Scituate Sav. Bank, 137 Mass. 301; Ferry v. Home Sav. Bank, 114 Mich. 321, 68 Am. St. Rep. 487, 72 N. W. 181.

l. **Right of Bank to Prohibit Withdrawals.**—It was held in Makin v. Savings Inst., 23 Me. 350, 41 Am. Dec. 349, that a savings institution cannot prohibit withdrawals of deposits under a power in its charter to regulate such right by limiting its exercise to such reasonable time as the institution may appoint. And in Abramowitz v. Citizens' Sav. Bank, 17 Misc. Rep. 298, 40 N. Y. Supp. 385, it was said an action to recover the balance of a deposit claimed to have been unlawfully paid to another cannot be claimed to be prematurely brought where the refusal to pay was not placed on the ground that the bank was entitled to ninety days' notice.

The right of savings banks to prohibit withdrawal or require a certain notice of such an intention to do so is a matter which is generally regulated by its charter or by-laws, and is naturally part of the contract of deposit.

m. **Effect of Deposit Being in Excess of Statutory Limit.**—The fact that the law makes it unlawful for a savings bank to receive from any person a deposit in excess of a certain amount does not prevent such person from recovering the excess: Taylor v. Empire State Sav. Bank, 66 Hun, 538, 21 N. Y. Supp. 643.

XIV. Right of Savings Banks to Require Indemnity Before Repaying Deposit.

It seems that where the by-laws require the production of the pass-book, and in case of its loss, adequate security, that the bank may

require the furnishing of an indemnity bond, in lieu of its production: Mitchell v. Home Sav. Bank, 38 Hun, 255. In Wall v. Provident Inst. for Sav., 3 Allen, 96, under a by-law which provided that "no person shall receive any part of their principal or interest without producing the original book," it was held that the depositor's administrator could not maintain an action against the savings bank upon the deposit without producing the book or tendering in lieu thereof a satisfactory bond of indemnity. While in Wallace v. Lowell Inst. for Sav., 7 Gray, 134, it was held where the deposit was made by an agent, but in the name of the principal, the agent signing the principal's name, but the bank not being advised that the agent was not the principal, that the principal could sue for the deposit without tendering a bond where, in response to a request for reasonable evidence of ownership or indemnity, the depositor furnished an affidavit of the facts besides producing the pass-book. While in a still later case in that same court (Hudson v. Roxbury Inst. for Sav., 176 Mass. 522, 57 N. E. 1021), it was held where the identity of the depositor with the intestate is admitted by the bank, and the deposit-book is shown to have been destroyed in a fire, that the administrator cannot be required to furnish a bond of indemnity as a condition of payment by the bank. And in Heath v. Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194, under a by-law stating that no withdrawal would be allowed without the pass-book being presented, it was held that indemnity could be required.

But the rule respecting the right to require indemnity is often relaxed to meet the circumstances of particular cases. Thus, it was said in Cosgriff v. Hudson City Sav. Inst., 24 Misc. Rep. 4, 52 N. Y. Supp. 189, that the bank cannot insist upon being made secure beyond the peradventure of doubt or risk. And in Mills v. Albany Exchange Sav. Bank, 28 Misc. Rep. 251, 59 N. Y. Supp. 149, the court said that a by-law providing that "in case of lost books the bank will decide as to the person to whom payment shall be made," does not authorize a refusal to pay when the book is presented or adequate indemnity given, where notice of loss of the book was given seven years previously and no claim was made by anyone else for the deposit. And in Palmer v. Providence Inst. for Sav., 14 R. I. 68, 51 Am. Rep. 341, a rule in the pass-book provided that no payment should be made without the production of the book. The depositor died and his family refused to give the book to the administrator. The court held that he could recover without producing the book and without giving a bond of indemnity.

The court in Wagner v. Howard Sav. Bank, 52 N. J. L. 225, 19 Atl. 212, took a very decided stand against the requiring of any bond of indemnity as a prerequisite to payment of the deposit. It discussed the effect of the various rules common to savings banks in an exhaustive opinion. The court laid great stress upon the non-negotiable character of the pass-book and the nonliability of the bank to a holder of the pass-book of whom it had no notice prior to pay-

ing the depositor. The reasonableness of a by-law which would preclude the depositor, in case of loss of his pass-book, from suing for the moneys due him was questioned.

XV. Matters in Nature of Estoppel or Contributory Negligence on Part of Either the Bank or Depositor.

a. Matters in Nature of Estoppel.—Where a savings bank takes money as a special deposit and converts it, it is estopped from denying liability to repay on the ground that its receipt of the money was ultra vires: Abbott v. Wolfeborough Sav. Bank, 68 N. H. 290, 38 Atl. 1050. And where a depositor is a nonresident and places the collection of his deposit in hands of an attorney who demands it, presenting the pass-book, and the officers inform the attorney that they will not pay the interest claimed, but will look into the question of the principal, the bank cannot after suit is brought claim that the attorney had not complied with the by-laws requiring him to show written authority to collect the deposit: Atlanta etc. Bkg. Co. v. Close, 115 Ga. 939, 42 S. E. 265. And in Farmer v. Manhattan Sav. Inst., 60 Hun, 462, 15 N. Y. Supp. 235, the bank's rules provided that payments to a person producing pass-book should be valid, and that on death of depositor his deposit should be paid to his legal representative. An alleged donee causa mortis presented the pass-book, but payment was refused. His attorney then prepared complaint, answer and referee's decision, all without cost to the bank. It was held in an action by the administrator of the donor that the question of the defendant bank's negligence in making payment under such circumstances should have been submitted to the jury.

Ordinary depositors who are stockholders in a savings bank and who, with full knowledge of the facts, have enjoyed the full benefit of money loaned to the bank by special depositors, are estopped from alleging that such special deposits are ultra vires: Heironimus v. Sweeney, 83 Md. 146, 55 Am. St. Rep. 333, 34 Atl. 823. So, also, where a depositor, learning after his wife's death that she had deposited his money in her name, had an administrator appointed who collected the deposit, cannot afterward make any claim against the bank: McDermott v. Miners' Sav. Bank, 100 Pa. St. 285.

b. Matters in Nature of Contributory Negligence.—The owner's negligent loss of his pass-book does not excuse the bank where it negligently paid the deposit to an impostor: Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 39 Atl. 336, 68 L. R. A. 700; Ladd v. Augusta Sav. Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288. So, also, a savings bank negligently paying a deposit on forged orders to one who fraudulently obtained the pass-book from the owner is not relieved from liability by showing that the owner was negligent: Chase v. Waterbury Sav. Bank, 77 Conn. 295, 59 Atl. 37. In Wall v. Emigrant Indus. Sav. Bank, 64 Hun, 249, 19 N. Y. Supp. 194, it was held where the information which enabled the false impersonator

to answer the test question was given by the depositor in response to a letter of inquiry from a stranger, that the negligence of the depositor was the proximate cause of the loss. This decision was criticised in Geitelsohn v. Citizens' Sav. Bank, 17 Misc. Rep. 574, 40 N. Y. Supp. 662, the court saying: "The necessity for the rule in such a case is not apparent. If the holder of the pass-book answers the questions correctly, and there are no suspicious circumstances putting the bank officers upon inquiry, payment exonerates the bank, and the negligence of the depositor is immaterial. If there are suspicious circumstances calculated to excite inquiry, and the bank officers fail to exercise due care in making inquiry, the bank would be liable notwithstanding the negligence of the depositor. In the present case the assumed negligence of the plaintiff in leaving his pass-book in a place accessible with little effort to a person whom he had admitted for three months as a room-mate and member of his household, would not relieve the defendant from the necessity of putting the test questions for identification to the person presenting the pass-book. If they neglected to apply such a test the negligence of plaintiff would have contributed in no wise to the injury; having done so, his negligence was equally immaterial."

XVI. Right of Depositor to Recover Legal Rate of Interest on Deposit After Refusal of Bank to Repay It.

In Wegner v. Second Ward Sav. Bank, 76 Wis. 243, 44 N. W. 1096, the pass-book was stolen and the amount of the deposit paid by the bank. The depositor sued in replevin for the pass-book or the amount due at the time of the theft. The court held that plaintiff's recovery properly included interest at the legal rate of seven per cent on the value of the pass-book from the time when the bank refused to deliver it to him, even though the deposit previous to that time had been drawing interest at only the rate of three per cent.

SEAMANS v. BARENTSEN.

[180 N. Y. 333, 73 N. E. 42.]

STATUTE OF FRAUDS, Contract, When Within.—A contract made in the latter part of March, 1900, to purchase for the term of one year, commencing on the first day of April of the same year, the milk to be produced on a specified farm, at a price designated, is within the statute of frauds. (p. 760.)

STATUTE OF FRAUDS, Plea of may be Answered Though It Might also have been by Demurrer.—The failure to plead the statute of frauds by demurrer when the invalidity of a contract appears on the face of a complaint is not a waiver, and defendant may still interpose such plea by his answer, where the code provides that an objection taken neither by demurrer nor answer is deemed to have been waived, except an objection that the complaint does not state facts sufficient to constitute a cause of action. (p. 761.)

William W. Armstrong and Charles F. A. Young, for the appellant.

Safford E. North, for the respondent.

335 CULLEN, C. J. Plaintiff declared on an oral contract made in the latter part of March, 1900, whereby the defendant for a term of one year commencing on the first day of April, 1900, agreed to purchase the milk produced on the plaintiff's farm at a specified price, and claimed to recover damages for a breach of said agreement. The defendant answered making a general denial and pleading specially the statute of frauds. When the case was brought on for trial the defendant moved for judgment on the pleadings on the ground that the agreement declared upon was void under the statute of frauds. The motion was denied and an exception duly taken. When evidence was offered to prove the contract the defendant again objected that a contract not to be performed within a year must be established by written proof. Over defendant's objection and exception the evidence was admitted. The case was submitted to the jury on the disputed questions of fact, and a verdict rendered for the plaintiff. The judgment entered on that verdict was affirmed by the appellate division, and an appeal take from such affirmance to this court.

The judgment below cannot be sustained. The contract on which the plaintiff has recovered was unquestionably void under the statute of frauds. Its invalidity not only appeared on the face of the complaint, but was expressly pleaded in the defendant's answer. The motion for judgment on the pleadings 336 and the objection to the admission of the plaintiff's testimony sufficiently raised the question of the invalidity of the contract. The learned appellate division seems to have affirmed the judgment of the trial term on the ground that as the invalidity of the contract appeared on the face of the complaint the defendant's objection to it could be taken by demurrer only, and was waived by the answer. This position is untenable.

Section 48 of the Code of Civil Procedure specifies eight different causes of demurrer. It is entirely clear that the objection to the complaint in this action falls within the eighth clause, to wit: "That the complaint does not state facts sufficient to constitute a cause of action." This the learned counsel for the respondent conceded on the argument. By section

498 of the code, when any grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. By section 499 an objection taken neither by demurrer nor answer is deemed to have been waived, except the objection that the complaint does not state facts sufficient to constitute a cause of action. The objection taken by the appellant at the opening of the trial was, therefore, taken in due time, and his motion for judgment on the pleadings should have been granted, for by pleading the statute of frauds in his answer his condition could not be worse than if he had not set it up at all.

The learned court below justified its disposition of the case by our decision in Crane v. Powell, 139 N. Y. 379, 34 N. E. 911. There it was held that a complaint not showing whether the contract declared on was oral or written, the statute of frauds to be available to defendant must be pleaded. That decision does not touch the point presented by this appeal. There is, however, to be found in the opinion this sentence: "When the defect in the plaintiff's cause of action appears on the face of the complaint, the defense must be interposed by demurrer." "Must" in the opinion should be "may." Whether the text as it appears in the reports is a typographical error, a mistake of the copyist or a slip of the learned judge writing the 637 opinion, is immaterial. If the last be the fact, it was merely obiter, for the point was not in any way involved in the case, and we could not decide away the express provision of the code.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

Gray, O'Brien, Bartlett, Haight, Vann, and Werner, JJ., concur.

Judgment reversed, etc.

When and How the Statute of Frauds may be pleaded is discussed in the monographic notes to Jordan v. Greenboro Furnace Co., 78 Am. St. Rep. 648-658; Hotchkiss v. Ladd, 86 Am. Dec. 684-688.

BURKS v. BOSSO.

[180 N. Y. 341, 73 N. E. 58.]

STATUTES, PENAL, Construction of.—A penal statutory offense cannot be established by implication, and acts in themselves innocent and lawful cannot be held to be criminal, unless there is clear and unequivocal expression of the legislative intent to make them such. (p. 763.)

CIVIL RIGHTS—Bootblack Stands.—A statute declaring that all persons within the state are entitled to the full and equal accommodations, facilities, privileges of its restaurants, hotels, eating-houses, bath-houses, barber-shops, theater, music-halls, public conveyances on land and water, and all other places of public accommodation and amusement, is not applicable to bootblack stands. The phrase "all other places of public accommodation and amusement" is limited and qualified by the specific designation which precedes it. (p. 764.)

Thomas P. McCarrick, for the appellant.

Frederick L. Dutcher, for the respondent.

342 WERNER, J. This action was brought to recover the penalty provided for by chapter 1042 of the Laws of 1895, entitled "An act to protect all citizens in their civil and legal rights." The pertinent parts of the statute are as follows:

"Section 1. That all persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, bath-houses, barber-shops, theaters, music-halls, public conveyances on land and water, and all 343 other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens."

"Sec. 2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizens, except for reasons applicable alike to all citizens of every race, creed or color, and regardless of race, creed and color, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay a sum not less than one hundred dollars nor more than five hundred dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction in the county where said offense was committed; and shall, also, for every such offense be deemed guilty of a misdemeanor."

The record discloses that on the twenty-seventh day of November, 1901, the defendant was the proprietor of a "bootblacking" business, which he carried on in a small booth or apartment on the ground floor of Powers Building, which is a large structure devoted to stores, offices and studios, and is located in the center of the business district of the city of Rochester. On the date above mentioned, the plaintiff, a respectable colored man, went to the defendant's establishment, asked to have his shoes polished, and tendered the amount usually charged for such service by the defendant. The latter refused the money tendered, and declined to render the service on the ground that the plaintiff was a colored man. The plaintiff thereupon brought this action in the municipal court of the city of Rochester and a jury rendered a verdict in his favor. From the judgment entered upon that verdict the defendant appealed to the county court of Monroe county and secured a reversal. The plaintiff then appealed to the appellate division, where the judgment of the county court was reversed and that of the municipal court affirmed. By permission of the appellate division the case is now before this court for determination.

Much learning and logic have been exploited in the several 344 opinions that have been written during the somewhat uncertain course of this litigation, but in the view we take of the question involved the controversy may be disposed of by a few simple suggestions.

The statute in question is highly penal. It subjects any person who violates its provisions to a civil penalty at the suit of the person aggrieved, and to a fine or imprisonment as for the commission of a misdemeanor. One of the well-settled canons of statutory construction is that purely statutory offenses cannot be established by implication, and that acts in and of themselves innocent and lawful cannot be held to be criminal unless there is a clear and unequivocal expression of the legislative intent to make them such: People v. Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141.

In the light of this rule it seems obvious that the statute under consideration cannot be held to apply to a "bootblacking stand," unless we can say that such an establishment falls within the general phrase of the statute, "and all other places of public accommodation," which follows the specific enumeration of such places as "inns, restaurants, hotels, eating-houses, bath-houses, barber-shops, theaters, music-halls and public con-

veyances on land and water." We do not deem it necessary at this time to enter into a discussion as to how far the sovereign power may go in restricting the individual rights and privileges which inhere in some of the callings enumerated in the statute under consideration, because we are of the opinion that the phrase, "and all other places of public accommodation," does not include bootblacking stands. The phrase referred to, although general in its nature, is limited and qualified by the specific designations which precede it: People v. Richards, 108 N. Y. 137, 2 Am. St. Rep. 373, 15 N. E. 371; People v. New York etc. Ry. Co., 84 N. Y. 565; Sims v. United States Trust Co., 103 N. Y. 472, 479, 9 N. E. 605; Matter of Hermance, 71 N. Y. 481; Mangam v. City of Brooklyn, 98 N. Y. 585, 595, 50 Am. Rep. 705.

A bootblacking stand may be said to be a place of public accommodation, like the store of a drygoods merchant, a grocer, or the proverbial "butcher, baker and candlestick [345] maker," but that is very far from placing it in the same category with the places specifically named in the statute. Inns, hotels and public conveyances are places of public accommodation in the broadest sense, because they have always been denominated as such under the common law. Bath-houses and barber-shops are not in the same class with hotels and public conveyances, and would certainly not be regarded as included within the statute under the general phrase "and all other places of public accommodation." There is no more relation between a bootblacking stand and a public conveyance than there is between a theater or music-hall and a bath-house or barber-shop.

There is, it is true, a superficial resemblance between the occupation of the barber and that of the bootblack in the sense that both minister to the personal comfort and convenience of others, but the same argument could be extended far beyond the limits necessary to demonstrate that not "all other places of public accommodation" are included by relation within the category of the things specifically enumerated in the statute. The legislature seems to have had no difficulty in naming a variety of places and callings that have never been regarded as places of public accommodation under the common law, and if bootblacking stands are to be brought within the purview of the statute under the words "and all other places of public accommodation," it will require no great stretch of the imagination to apply this statute to innumerable places and callings that have never been, and probably never will be, regarded as subject to legislative control or direction.

For these reasons we think the judgment of the appellate division should be reversed and that of the county court affirmed with costs in all courts.

Cullen, C. J., Gray, O'Brien, Bartlett, Haight and Vann, JJ., concur.

Judgment reversed, etc.

Though Criminal Statutes **are to be strictly construed in favor of the accused, the courts are not authorized to so interpret them as to defeat the obvious purpose of the legislature, or to so narrow the words of the statute as to exclude cases which those words, in their ordinary acceptation, include: State v. Woodward, 182 Mo. 391, 103 Am. St. Rep. 646, and see the cases cited in the cross-reference note thereto.**

CITIZENS' STATE BANK v. COWLES.

[180 N. Y. 346, 73 N. E. 33.]

WHERE A VERDICT is Directed Against a Party, he is, on appeal, entitled to the most favorable inference to be drawn from the evidence. (p. 766.)

NEGOTIABLE INSTRUMENTS—Holder of Check in Due Course and for Value, Who is not.—The mere crediting on a depositor's account by a bank on its books of the amount of a check drawn on another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. (p. 766.)

Justus A. B. Cowles and Charles P. Cowles, for the appellant.

Jerome A. Peck, for the respondent.

347 WERNER, J. The action is upon a check dated June 1, 1900, drawn by the defendant upon the First National Bank of Port Chester, New York, to the order of W. W. Miller & Sons, for six hundred dollars. The check was given in payment for a team of horses purchased by the defendant from the Millers under a written guaranty of soundness and condition, the alleged breach of which is now sought to be interposed as a defense.

The horses were delivered shortly after midnight on the second day of June, and later in the morning it was discovered that one of them was ill from pneumonia, as a result of which it died within about nine days. On Monday, the 4th of June, which was the first business day after the giving of the check, the defendant's son notified the bank to stop payment on the

check and then communicated by telephone with one of the payees, advising him of the sickness of one of the horses, and of the fact that payment of the check had been stopped.

The payees indorsed the check to one George M. Hoffman, the president of the plaintiff bank, and mailed it to him at Little River, Kansas, but whether it was so mailed before or after the notification as to the illness of the horse does not appear. Hoffman received the check on the eighth day of June, indorsed it, and within two or three hours deposited it with the plaintiff, which credited the amount thereof to Hoffman's account, indorsed the check to the National Bank of Kansas City, Missouri, and sent it to that bank for collection. What was done with the check after that does not appear, except as it may be inferred from the fact that it was received by the First National Bank of Port Chester (on which bank it was [348] drawn) on the 14th of June, where it was protested and marked "Payment stopped."

One of the issues tendered by the defendant's answer was that the plaintiff was not an innocent holder of the check for value. Upon the trial the plaintiff made out its case by introducing the check in evidence and relying upon the presumptions in support of negotiable paper, together with the allegations and admissions of the answer. The defendant then introduced evidence bearing upon the breach of warranty or failure of consideration in the sale of the horses, and this was supplemented by reading from depositions issued to Hoffman and Waitt, who were officers of the plaintiff bank. From these depositions it appeared that at the time of the delivery of the check to the plaintiff the payees thereof did not have an account with the plaintiff bank, and that the check was indorsed by the payees to Hoffman, who at once indorsed and delivered it to the plaintiff. At this point we encounter some haziness in the testimony. Hoffman stated that the check was indorsed to him and he received the money from the bank. Waitt, the cashier, testified that the plaintiff paid six hundred dollars for the check, but afterward qualified this by saying that as cashier he credited Hoffman's account with the amount of the check. Had the conflicting inferences which may be drawn from these equivocal statements been submitted to a jury with proper instructions, the defendant would, of course, be bound by a decision against her, because it would have to be assumed that the plaintiff had become the actual owner of the check by purchase. The difficulty with the case is that the verdict was di-

rected against the defendant, thus entitling her to the most favorable inferences to be drawn from the evidence: Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Ladd v. Aetna Ins. Co., 147 N. Y. 478, 484, 42 N. E. 197; Weil v. Dry Dock etc. R. R. Co., 119 N. Y. 147, 152, 23 N. E. 487.

It is obvious that if the evidence would support the inference that the plaintiff did not buy the check, but simply gave Hoffman credit for the amount upon its books, then plaintiff is not a holder of the check in due course within the law-merchant, [349] as that term is now defined in the negotiable instruments law, so as to render its title superior to the defenses which the drawer of the check may have against the payees. Under the negotiable instruments law four elements must concur to constitute such a title: 1. The instrument must be complete and regular on its face; 2. The holder must receive it before it is overdue and without notice that it has been previously dishonored, if that is the fact; 3. It must have been taken in good faith and for value; 4. It must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it: Negotiable Instruments Law, sec. 91. If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course: Albany County Bank v. People's etc. Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 244, 14 Sup. Ct. Rep. 94, 37 L. ed. 1063; Dykman v. Northbridge, 80 Hun, 258, 30 N. Y. Supp. 164; Central Nat. Bank v. Valentine, 18 Hun, 417.

The evidence upon this feature of the case is meager and unsatisfactory, but we must take it as it is. Hoffman, the plaintiff's president, stated that he received the money on the check, but he did not fix any time. For aught that appears in the record, that may have been after the plaintiff had received notice of the dishonor of the check. Waitt, the plaintiff's cashier, stated that the plaintiff had paid six hundred dollars for the check, but that is qualified by his later statement that he gave Hoffman credit for the amount upon the books of the bank.

The view of the evidence most favorable to the defendant would, we think, have justified a jury in finding that the amount of the check had simply been credited to Hoffman's [350] account, and that no money was paid to him by the plaintiff upon the check before the latter had notice of its dishonor.

The judgments of the courts below should be reversed, and a new trial granted, with costs to abide the event.

Cullen, C. J., Gray, O'Brien, Bartlett, Haight and Vann, JJ., concur.

Judgments reversed, etc.

Bona Fide Ownership of Negotiable Paper is discussed in the monographic note to Bedell v. Herring, 11 Am. St. Rep. 309-326. And the effect of a check indorsed for deposit is discussed in the monographic note to Ditch v. Western Nat. Bank, 47 Am. St. Rep. 389-392.

O'BRIEN v. FLECKENSTEIN.

[180 N. Y. 350, 73 N. E. 30.]

BONA FIDE HOLDER or Mortgagor, Who Entitled to Protection as—Consideration of Extension of Time for Payment.—If the holder of an indebtedness takes a new note therefor, whereby the time of payment is extended, and a mortgage to secure the payment of such note, a new element or consideration is imported into the transaction between the parties, which supports the mortgage as a purchase for a valuable consideration and entitles it to precedence over a mortgage of prior date recorded subsequently to the second mortgage. (pp. 770, 771.)

Hugh J. O'Brien, for the appellant.

John P. Morse, for the respondents.

[351] O'BRIEN, J. The plaintiff in this action sought to foreclose a mortgage for thirteen hundred dollars, dated July 9, 1902, and due in three months from date. It appears that there was paid upon this mortgage the sum of five hundred dollars. The mortgage was not recorded until November 25th, following its date. The firm of W. B. Morse & Sons held another mortgage on the same premises for thirteen hundred and fifty dollars, bearing date November 17, 1902, due one month [352] from date and recorded November 18, 1902, or before the mortgage of the plaintiff.

A part of the relief which the plaintiff demanded in the action was that the court adjudge that his mortgage, which was prior in point of time, should be declared the superior lien,

and the question is, Which of the two mortgages took priority? The defendants, W. B. Morse & Sons, were the owners of the second mortgage, and it was insisted in their behalf that inasmuch as they knew nothing of the plaintiff's mortgage and had no notice of its existence at the time that they took the second mortgage, which, being first recorded, became the first lien under the provisions of the real property law: Sec. 241. It is there declared that a conveyance not recorded "is void as against any subsequent purchaser in good faith and for a valuable consideration from the same vendor, ... of the same real property, ... whose conveyance is first duly recorded," and the term "conveyance" includes a mortgage. The two mortgages were executed by the same vendor, and the trial court found as a fact that the later mortgage was given to secure a pre-existing indebtedness, and that no new consideration was imported into the transaction. It was admitted at the appellate division that the only question in the case was whether this finding was supported by evidence, for if the sole purpose of the second mortgage was to secure an antecedent debt, then Morse & Sons were not mortgagees for a valuable consideration within the meaning of the recording act.

The learned appellate division reversed the judgment rendered at the trial term in favor of the plaintiff, and it is stated in the order that the reversal was upon the law and the facts and that a new trial should be ordered. This court, therefore, has no power to review the order or the judgment entered thereon, unless it appears that there was no question of fact in the case upon which the learned appellate division could properly have reversed the judgment. That is really the only question that this appeal presents. The defendants, Morse & Sons, gave proof at the trial tending to show that [353] Fleckenstein, the vendor, who executed the two mortgages owed them a debt amounting to two thousand seven hundred dollars at the date of the execution of their mortgage; that the debt had been due since the month of April or May preceding, and that they were pressing him for payment. The evidence tended to show that on that day he gave them a note for thirteen hundred and fifty dollars, due in one month, secured by the mortgage in question for a like sum on the premises described in the complaint, and the residue of the debt was secured in another way. The question is whether this transaction gave to the defendants, Morse & Sons, the character of bona fide purchasers or mortgagees within the meaning of the recording

act. It will be seen that by receiving the debtor's note and balancing the account against him on their books they extended the time of payment; that is to say, they disabled themselves from suing upon the debt for one month from the date of the note and mortgage, and hence further credit was given.

Under the authorities we think that a new element or consideration was imported into the transaction between the parties; that is to say, by the extension of time upon the preexisting debt and the taking of security to be enforced at the end of that time. The law upon this question is thus stated in Jones on Mortgages (section 459): "The giving of further time for the payment of an existing debt by a valid agreement, for any period however short, though it be for a day only, is a valuable consideration, and is sufficient to support a mortgage as a purchase for a valuable consideration." It was clearly competent for the learned court below on the hearing of the appeal to decide upon the evidence in the case that just such an agreement was made as the consideration for the mortgage last executed but first recorded, and hence the reversal upon the law and the facts. The adjudicated cases that deal with the question as to what constitutes a valuable consideration in such a case as this are not very clear or satisfactory, and it may be said that they are in some respects apparently conflicting and contradictory. It must be borne in mind, however, that they deal with the question in various aspects. Sometimes the question arises 354 between the immediate parties to the transaction, sometimes with respect to negotiable paper and the rights of sureties claimed to have been discharged by some extension of time, and again with respect to the rights of subsequent purchasers, as in the case at bar. It is safe enough to say that the general trend of the cases and the consensus of opinion supports the rule or principle above stated. I have not been able to find any case where it has been held that such a transaction as appears in this record does not constitute a valuable consideration, and the absence of cases upon the precise point that could be regarded as conclusive is doubtless due to the fact that for many years the rule above stated has been universally accepted and acted upon by the bench and the bar as the law in this state. Perhaps none of the cases to which I will now refer are perfectly in point or conclusive of the question, but they all show the general trend of the discussion, and, as I think, plainly recognize the rule as I have stated it above: Cary v. White, 52 N. Y. 138; Breed v. National Bank of Auburn, 57 App. Div. 468, 68

N. Y. Supp. 68; affirmed, without opinion, 171 N. Y. 648, 63 N. E. 1115; Hubbard v. Gurney, 64 N. Y. 457; Ten Eyck v. Witbeck, 135 N. Y. 40, 48, 31 Am. St. Rep. 809, 31 N. E. 994; Mechanics' & Farmers' Bank v. Wixon, 42 N. Y. 438; Pratt v. Coman, 37 N. Y. 440; Brown v. Leavitt, 31 N. Y. 113; Westbrook v. Gleason, 79 N. Y. 23; Weaver v. Barden, 49 N. Y. 286; DeLancey v. Stearns, 66 N. Y. 157; Metzer v. Doll, 91 N. Y. 365; Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850. Therefore, we hold that where a party gives a valid extension of the time of payment of a pre-existing debt and takes a mortgage as security for the same, that he is thereby constituted and given the character of a bona fide purchaser for a valuable consideration, within the meaning of the recording act.

So the real question in this case is whether there was a question of fact and whether the appellate division had the right to reverse the finding of the trial court that there was no consideration for the defendant's mortgage, except a pre-existing debt. It is quite clear that the proof given by the junior mortgagee tended to show that there was something [355] more in the consideration of the mortgage than the mere existence of a precedent debt; that is to say, that there was a valid agreement between the debtor and the creditor to extend the time of payment, and that the creditor surrendered the right to sue during the period of extension. The learned court below determined that the finding of the trial court was against the evidence, and hence it reversed the judgment upon the law and the facts. This court cannot say that there was any error in that determination, and so the order appealed from must be affirmed and judgment absolute ordered for defendants on the stipulation, with costs.

Cullen, C. J., Gray, Bartlett, Haight, Vann and Werner, JJ., concur.

Ordered accordingly.

A Mortgage given to pay a pre-existing indebtedness is based upon a sufficient consideration, and protects the mortgagee to the same extent as if a new consideration had been given: Chaffee v. Atlas Lumber Co., 43 Neb. 224, 47 Am. St. Rep. 753; Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 117. And a stay of execution is a valuable and sufficient consideration to support a chattel mortgage: Comron v. Standland, 103 N. C. 207, 14 Am. St. Rep. 797. Forbearance to sue as a consideration for contracts generally is considered in the note to Prater v. Miller, 60 Am. Dec. 525-527; Davis v. Teachout, 126 Mich. 135, 86 Am. St. Rep. 531.

HOME INSURANCE COMPANY v. CONTINENTAL INSURANCE COMPANY.

[180 N. Y. 389, 73 N. E. 65.]

INSURANCE—Reinsurance, Meaning of "Pro Rata" in Contracts of.—If two insurers obtain reinsurance from a third "the loss, if any, payable pro rata at the same time, and in the same manner as by such companies," the respective amounts of loss which the original insurers and the reinsurer must pay is proportionate to the amount of the original and the amount of the reinsurance, and this proportion cannot be changed by any act of the original insurers in diminishing the amount of the insurance. Hence, if the original insurance was for ten thousand dollars and the reinsurance for five thousand dollars, and afterward the original insurance was reduced to two thousand dollars, and subsequently a loss occurs, the reinsurer's liability is for one-half of the last named sum only. (pp. 774, 775.)

EVIDENCE, EXPERT, When not Admissible.—The evidence of experts is not admissible to show the usage and object of underwriters in inserting the pro rata clause in policies of reinsurance, where the object of the evidence is to contradict the plain language in the policy after its meaning has been settled by the construction of the courts. (pp. 776, 777.)

George Richards, for the appellant.

William C. Trull, for the respondent.

391 VANN, J. This action was brought by two fire insurance companies against a third upon a contract of reinsurance in the standard form, made under the following circumstances: On the 13th of June, 1895, the plaintiffs "each acting and contracting for itself and not one for the other," by a policy otherwise joint in form, insured one Heilner for the 392 term of one year to an amount not exceeding $10,000 against loss by fire to a quantity of wool. On the 16th of July, 1895, the defendant reinsured the plaintiffs against all loss, except as otherwise provided, under their said policy to Heilner to an amount not exceeding $5,000, "subject to the same risks, conditions, valuations, indorsements and assignments as are or may be assumed or adopted by the Home Insurance Company of New York and the Phoenix Insurance Company of Hartford, Connecticut." It was also provided that "the loss, if any," should be "payable pro rata at the same time and in the same manner as by said companies. Other reinsurance permitted if desired." These provisions appeared in what is called a rider attached to the standard form of policy in order to convert it into a contract

of reinsurance. It was provided in the body of the policy that the defendant should not be liable "for a greater proportion of any loss on the described property . . . . than the amount hereby insured shall bear to the whole insurance, whether valid or not. . . . . Liability for reinsurance shall be as specifically agreed hereon."

Prior to August 12, 1895, the plaintiffs, at the request of Heilner and without notice to the defendant, reduced his insurance to the sum of $2,000, and on that day the property covered by their policy was injured by fire to an amount exceeding $3,000. They paid Heilner $2,000, the amount of their policy as reduced, and they also paid $14.10 for the necessary expense of adjusting the loss. They served proofs of loss on the defendant, claiming that they were entitled to $2,014.10, the whole amount paid by them, and more than sixty days thereafter commenced this action to recover that sum. Upon the first trial they were awarded the whole amount claimed, but the judgment was reversed by the appellate division: Home Ins. Co. v. Continental Ins. Co., 62 App. Div. 63, 70 N. Y. Supp. 824. Upon the second trial the defendant was held liable for $1,007.05, or one-half the amount claimed, and, as an offer of judgment for that sum had been served, costs were allowed against the plaintiffs and judgment was entered in their favor for the remainder only. After [393] affirmance by the appellate division they appealed to this court.

The plaintiffs claim that the defendant under its policy of reinsurance is liable for the whole loss which they sustained under their policy of insurance. The defendant claims that it is liable for only one-half that amount, upon the theory that its contract is limited to such proportion of the loss as the amount of reinsurance bears to the amount of insurance.

The controversy turns upon the meaning of the following sentence as used in the policy of reinsurance: "The loss, if any, payable pro rata at the same time and in the same manner as by said companies." The mooted words are "pro rata," which mean, literally, "according to the rate," or, as ordinarily understood, "in proportion." The loss, therefore, is payable according to some proportion and must be apportioned in some way. Obviously the apportionment, as to parties, is to be made either between the plaintiffs alone or between the plaintiffs and the defendant; and as to amount, on the basis of facts existing at the date of the policy, or at the date of the loss. If it is between the plaintiffs simply, the

provision is unnecessary, and is of slight concern to one and of no concern to the other party to the contract; but if between the contracting parties, it relates to the amount of reinsurance to be paid and has a function to perform of importance to both. We agree with the appellate division that the parties intended to divide the loss between themselves according to the proportion which the amount of the defendant's policy of reinsurance bears to the amount of the plaintiffs' policy of insurance.

The promise of the reinsurer was to indemnify the insurers to an amount not exceeding $5,000 against their liability under the policy for $10,000 to Heilner, by paying pro rata any loss sustained by them—that is, by paying any such loss in proportion to the sums covered by the respective policies. There was no promise to pay the full amount of insurance, but a certain proportion thereof. The defendant did not say to the plaintiffs, "I will pay your loss, not exceeding $5,000." 394 but "I will pay my proportion of your loss not exceeding $5,000." The proportion was fixed by the contract in accordance with the amount of insurance furnished by either party as stated in the policy of reinsurance, or at the ratio of five thousand to ten thousand, which is one-half. After the contract was made the proportion could not be changed without the consent of both parties. It could not be affected by any act of the plaintiffs in modifying their contract with Heilner. The right to change their contract with him was unrestricted, but any change could not affect the ratio of five thousand to ten thousand, which was agreed upon as the basis of division. The amount of insurance might be changed, but not the proportion which the reinsurer was to pay if a loss occurred. The plaintiffs, by agreement with the owner of the property, might reduce the amount of his policy to $2,000 or increase it to $20,000, but the promise of the defendant to pay in accordance with the proportion originally fixed would remain unchanged. That promise was to pay upon the ratio settled by the facts existing at the date of the contract, and which were stated therein. It was agreed that the amount of insurance was $10,000 and that the amount of the reinsurance should be $5,000, payable pro rata in case of loss. There is no agreement to pay the whole loss, but a pro rata share thereof, in proportion to the amounts of the policies as they stood when issued. The premium paid to the defendant is presumed to have been arranged with reference to those amounts. The plaintiffs received a premium of $230 and they paid $115, or one-half

thereof, to the defendant, which assumed a like proportion of the loss.

While the "risks, conditions, valuations, indorsements and assignments" of the policy of insurance might be changed by the plaintiffs for their own convenience after the policy of reinsurance was issued, it could have no effect on the defendant's promise which was founded upon the amount of original insurance existing when it was made. The plaintiffs by altering their risk with the insured could not alter the proportion of any loss which the defendant had agreed to pay. That proportion was determined by the defendant's policy in accordance 396 with the facts as they stood at its date and as they were therein recited, and while they might subsequently be changed, the proportion would remain the same, because it was agreed upon as the basis of the contract to reinsure. The defendant took upon itself one-half of the plaintiff's risk under a certain policy, specifically identified by number, not one-half of all risks outstanding. If the plaintiffs at the same time had had other policies on the same property not referred to in the defendant's policy, the proportion would not have been changed, for it depended upon the ratio between the amount of the particular policy specified and that of the policy of reinsurance as issued.

The paragraph quoted from the body of the policy in suit is an apportionment clause which relates simply to policies of reinsurance as between themselves: Farmers' Feed Co. v. Scottish Union Ins. Co., 173 N. Y. 241, 65 N. E. 1105. It affects the adjustment between reinsurers only, and would control the amounts to be contributed by defendant's policy and any other policy of reinsurance which might have been taken out by the plaintiffs. No question of that kind has arisen, and the present controversy depends wholly upon the words of the reinsurance slip attached in the form of a rider. As we read those words they fix the proportion to be paid by the defendant in case of a loss according to the ratio which the amount of its policy bore to the amount of plaintiffs' policy when it was written. In no other way can adequate force be given to the words "pro rata," which by their ordinary meaning as used in the policy before us, as well as by the meaning given them by the courts when used under like circumstances in other policies, are the controlling words of the contract. This court has held that a policy without them means what the plaintiffs claim, and a policy with them what the defendant claims the contract in question means.

In an early case the words "pro rata" formed no part of the promise of the reinsurer, which was absolute in form. The agreement was "to make good unto the reinsured all such loss or damage, not exceeding" $10,000, "as should happen 396 by fire to the property described." The original insurance was $22,000, the reinsurance $10,000 and the loss $14,373.76. A recovery of the whole amount of the reinsurance was sustained, although the reinsurer was insolvent and could not meet its contract with the insured: Hone v. Mutual Safety Ins. Co., 1 Sand. 137; Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235.

Twenty-five years later a case was presented where the policy of reinsurance contained this clause: "Loss, if any, payable pro rata at the same time with the reinsured." The insurance was $5,000, the reinsurance $2,500 and the loss $4,470.62. This court, after quoting the pro rata clause, said that it did not occur in the case last cited, and then continued as follows: "By virtue of the first part of this clause the defendant is not bound to pay the full amount reinsured by its policy, but only such a proportion of the amount of the loss as is in the ratio of the amount of the reinsurance to the amount originally insured. Thus the defendant's reinsurance being for half the amount of the original insurance, the defendant is to pay half the loss": Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104, 107. The effect of the words under consideration is clearly shown by these cases, for in the earlier, where they were wanting, the promise was held to be absolute, while in the later, where they were present, it was held to be proportionate, or according to the ratio between the insurance and reinsurance.

The Blackstone case has pointed the way to judgment in various courts of high standing: Imperial Fire Ins. Co. v. Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609; Consolidated Real Estate etc. Ins. Co. v. Cashow, 41 Md. 59; Illinois Mut. Fire Ins. Co. v. Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620. See also, Continental Ins. Co. v. Aetna Ins. Co., 138 N. Y. 16, 21, 33 N. E. 724; Insurance Co. of the State of New York v. Associated Mfrs. M. F. Ins. Corp., 70 App. Div. 69, 74 N. Y. Supp. 1038, 174 N. Y. 541, 66 N. E. 1110; 24 Am. & Eng. Ency. of Law, 2d ed., 267.

Upon the trial the testimony of experts as to the usage and object of underwriters in inserting the pro rata clause in policies of reinsurance, although received by the referee, was 397 finally struck out upon motion of the defendant, against the objection and exception of the plaintiffs. The motion was

properly granted, for the evidence was incompetent. It did not tend to show the meaning of technical terms, nor place the referee in the situation of the parties, so that he could construe their agreement from their standpoint when it was made. The effect of the evidence was to contradict the plain language of the policy, after its meaning had been settled by the construction of the courts. Usage cannot control law, nor change the legal meaning of a contract: Hone v. Mutual Safety Ins. Co., 1 Sand. 137, 149; Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235, 240; Wheeler v. Newbould, 16 N. Y. 392, 401; Bigelow v. Legg, 102 N. Y. 652, 654, 6 N. E. 107.

The judgment should be affirmed, with costs.

BARTLETT, J., Dissenting. I am of opinion that the pro rata clause in the contract of reinsurance is properly construed by plaintiffs' counsel, and if it is desired to hold the original company to any fixed amount of insurance, the retainer clause must be used.

This practice has long prevailed in the insurance world, and to hold otherwise will greatly disturb the due course of business and possibly necessitate a change in the form of policies that have been long in use.

Cullen, C. J., Gray, O'Brien, Haight and Werner, JJ., concur with Vann, J.

Bartlett, J., reads dissenting memorandum.

Judgment affirmed.

For Authorities upon the Question of Reinsurance **involved in the principal case, see the monographic note to Barnes v. Hekla Fire Ins. Co., 45 Am. St. Rep. 445.**

FALK v. AMERICAN WEST INDIES TRADING COMPANY.

[180 N. Y. 445, 73 N. E. 239.]

A TRADEMARK does not Pass by Assignment separate from the business of its owner or of the article which it may serve to designate. Generally, it passes only with the business and goodwill of which it is an inseparable part. (p. 779.)

TRADEMARKS, Assignment of not Accompanied by the Goodwill of the Business.—If a manufacturer of cigars using a trademark to designate them goes out of business and assigns his trademark to another manufacturer, not accompanied by any business or goodwill, the assignee does not acquire any right to enjoin another from the use of such trademark or to recover damages for its use. (pp. 780, 781.)

APPEAL AND ERROR—Short Decision.—Where there is a "short decision," ultimately affirmed, the court of appeals cannot presume that any fact was found not embraced within the scope of the pleadings or findings as they appear of record and the proofs upon which the decision was made, and if the conclusion of law to the effect that the plaintiff was entitled to judgment is excepted to, the judgment must be reversed if the complaint fails to allege some fact essential to the recovery, and the findings and evidence are silent on the subject. (p. 781.)

Antonio Knauth and Isaac M. Aron, for the appellant.

S. K. Lichtenstein and Morris S. Wise, for the respondents.

448 O'BRIEN, J. The plaintiffs have recovered a judgment against the defendant, enjoining it from the use of a trademark claimed to be their property, and for damages in the sum of ten thousand dollars for infringement and the wrongful use by the defendant of the trademark in question.

It appears from the pleadings and findings of the trial court that about the year 1871 a partnership firm known as Lichtenstein Brothers & Co., engaged in the manufacture and sale of cigars, adopted and made use of the words "El Falcon" as a trademark to designate a particular brand of cigars. This firm afterward, and about the year 1886, was merged in a corporation of the same name, which took over the assets of the firm and succeeded to the goodwill of the business. The corporation continued in the business of manufacturing and 449 selling cigars and in the use of the trademark until the 31st of October, 1898, when it went out of business. On that day it executed and delivered to the plaintiffs an instrument in writing which purported to assign and set over to them the trademark in question, with the labels and devices that had

been used with the same. The plaintiffs thereupon assuming to have succeeded to all the rights of their assignor continued the use of the trademark at its manufactory at Key West, in Florida.

The defendant is a New Jersey corporation, but engaged in the manufacture and sale of cigars at Caguas, Porto Rico, with an office in New York. It appears that the manager of the corporation at that place, whose name is Gregorio Lopez y Falco, adopted his own name as a trademark for a brand of cigars, that are now known in the trade as the "El Falco." There is no similarity at all between the labels on the two trademarks, but there is a similarity in the names. No fraud however, is alleged or claimed, and no fraud or intent to deceive the public was found by the learned trial court. The judgment in this case is to the effect that the trademark so adopted by the defendant is an infringement upon the rights of the plaintiffs, and hence the injunction and award of damages.

The controlling question in this case is with respect to the plaintiffs' title, or exclusive right to the use of the trademark for an infringement of which they procured the injunction and recovered the damages. It does not appear, and is not claimed, that anything was assigned to the plaintiffs except the naked right to use the trademarks and labels. No business or goodwill was transferred to the plaintiffs by the instrument, and they did not succeed, by operation of law or otherwise, to the business in which the trademark had been used and to which it was attached. They were simply authorized to use the trademark in their own business established at another place. The use of the trademark by the plaintiffs denoted to the public that they were making and selling the Lichtenstein cigar, and that it was not applied to a cigar manufactured by other parties at any other place. The question [450] is whether, under these circumstances, the plaintiffs had any right to maintain this action. A trademark is not a piece of property that passes from hand to hand by assignment separate from the business of the owner of the trademark or of the article which it may serve to distinguish. Generally, it passes only with the business and goodwill of which it is an inseparable part. The rule in this respect is well stated in a recent work of great merit on that branch of the law with which we are now concerned.

"As a mere abstract right, having no reference to any particular person or property, a trademark cannot pass by assign-

ment or descend to a man's legal representatives. The reason for this is that, as an abstract right, apart from the business in which it is used, a trademark has no existence. To permit a trademark to be transferred apart from the business in which it is used would be productive of fraud upon the public. . . . . The mere sale of a trademark apart from the article to which it is affixed confers no right of ownership, because no one can claim the right to sell his goods as goods manufactured by another": Paul on Trademarks, secs. 116, 117, 144. The learned author, in the notes to the three sections referred to, has collected the leading cases on the subject, and it will be seen upon an examination of those authorities that they amply support the propositions contained in the text. Some of the cases thus referred to and in which the principle was discussed are the following: Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Macmahan Pharmacal Co. v. Denver Chem. Mfg. Co. (C. C. A.), 113 Fed. 468, 51 C. C. A. 302; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523. 534. 544; Williams v. Farrand, 88 Mich. 473, 480, 50 N. W. 446, 14 L. R. A. 161; Dixon Crucible Co. v. Guggenheim, 2 Brewst. (Pa.) 321, 339; Witthaus v. Mattfeldt & Co., 44 Md. 303, 22 Am. Rep. 44; Skinner v. Oakes, 10 Mo. App. 45, 59; Weener v. Brayton, 152 Mass. 101, 103, 25 N. E. 46, 8 L. R. A. 640; The Fair v. Jose Morales & Co., 82 Ill. App. 499; Messer v. Fadettes, 163 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407, 37 L. R. A. 721; Weston v. Ketcham, 51 How. Pr. 455; Cotton v. Gillard, 44 L. J. Ch. 90; Wood v. Lambert, L. R. 32 Ch. D. 247.

451 There is no allegation, proof or finding in this case that the plaintiffs, upon the execution of the writing referred to or at any other time, succeeded in any way to the business of the assignor or any part of it, or to the goodwill to which up to that time the trademark had been attached. It was, as already suggested, simply a written transfer of the naked trademark and labels detached from the business in which it had been theretofore used, and when used by the plaintiffs no longer denoted or distinguished the article or business to which it had been attached. We do not say that the principle above suggested would apply to an assignment of all trademarks made in a similar way. There are, doubtless, some trademarks that consist of words that identify an article produced by some secret process and without the use of which the article could not be described. In other words, the name used may be inherent in the article itself and is not used as in this case to dis-

tinguish one cigar from another. The celebrated cordial, which is in use the world over, known as "Chartreuse," is a sample of a trademark, the bare assignment of which might confer upon the assignee the right to manufacture and sell that article. Other examples might be cited that would not come within the rule above suggested, but in the case at bar the trademark was originally adopted by the Lichtensteins to distinguish a cigar manufactured by themselves. The trademark in their hands represented their own article, their own skill and business experience. When used by the plaintiffs in their business it does not truly denote anything of the kind, and the plaintiffs' claim really is that they have acquired the right to sell their own goods as the goods of some one else.

We do not, upon this appeal, assume to deal with any of the proceedings which appear at great length in the record and resulted in the ascertainment of damages as upon an accounting. The proofs on that branch of the case were taken before a referee upon whose report the court finally acted. The only question with which we are concerned upon this appeal is the question which was raised upon the trial of [452] the issues made by the pleadings before the court. That trial resulted in a decision which contains findings of fact and conclusions of law in the short form. The conclusion of law which was to the effect that the plaintiffs were entitled to judgment, was excepted to by the defendant's counsel. This exception raises the question in this court whether the conclusion of law upon which the judgment is based is sustained by the findings of fact; and since it does not appear from the findings that there was a transfer to the plaintiffs of anything but the naked trademark, these facts do not sustain the judgment. The complainant does not state that anything was transferred to the plaintiffs except the naked trademark. The findings are no broader than the complaint, and the proofs in the case, including the written assignment, are entirely silent on that point. Hence, although this was a short decision unanimously affirmed, we cannot presume that any fact was found not embraced within the scope of the pleadings, the findings as they appear in the record and the proofs upon which the decision was made. So the general exception raises the question of law with respect to the plaintiffs' right to maintain the action.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Gray, Haight and Vann, JJ., concur.

Cullen, C. J., Bartlett and Werner, JJ., dissent.

Judgment reversed, etc.

The Mere Sale of a Trademark, apart from the article to which it is affixed is said to confer no right of ownership: Witthaus v. Braun, 44 Md. 303, 22 Am. Rep. 44. See, in this connection, Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488; Kyle v. Perfection Mattress Co., 127 Ala. 39, 85 Am. St. Rep. 78; Listman Mill Co. v. Listman Milling Co., 88 Wis. 334, 43 Am. St. Rep. 907; note to Symonds v. Jones, 17 Am. St. Rep. 496.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

WEAVER v. GRIFFITH.

[210 Pa. St. 13, 59 Atl. 315.]

VENDOR AND VENDEE—Forfeiture, Effect of Failure to Declare.—If a vendor fails to elect to enforce his right of forfeiture for the vendee's default in making payments under a contract for the purchase of land, the vendee continues bound to his obligation to buy and the vendor to his obligation to sell. (pp. 783, 784.)

Bill by purchaser for specific performance of a contract for the sale of land. A decree was granted, upon which error was assigned.

J. N. Banks, for the appellant.

Clarence E. Sprout, S. M. Jack and D. B. Taylor, for the appellee.

14 Per CURIAM. The defendant might have terminated the contract under the clause that "In case the said party of the second part doth not make payment as above specified at the time herein stated then this agreement is to be null and void, and all parties are to be released from all liabilities herein and all money previously paid forfeited." But the failure to make the payments at the stipulated times did not, of its own force, terminate the contract. It was not one of option, but of sale and purchase, and prima facie the time of payment was not of its essence. While a contract may provide that it shall be terminable at the will of either party, so that a purchaser may even terminate it by his own default, yet such effect will not be given to it unless the intent of both parties to that effect be made ap-

parent by clear, precise and unequivocal language. The presumption is that the forfeiture clause is for the benefit of the vendor and enforceable at his election. Without such election and action the purchaser would not be released from his obligation to pay, and equally the vendor would continue to be bound by his agreement to sell.

In the present case the court below found as a fact that the defendant had not elected to enforce his right of forfeiture, but by his conduct had substantially waived it. Thus retaining his right to enforce the contract against the purchaser to buy he equally kept alive his own obligation to sell.

Decree affirmed.

For Authorities bearing upon the decision in the principal case, see Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; Moses v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58.

McCLINTOCK v. YOUNG REPUBLICANS OF PHILADELPHIA.

[210 Pa. St. 115, 59 Atl. 691.]

POLITICAL CLUB—Right to Inspect List of Membership. The list of members of a political club should, at proper times, be open to the inspection of all members, thereby affording to each of them an opportunity to aid in carrying out the object of the organization as set forth in its charter. (p. 787.)

POLITICAL CLUB—Mandamus—Exhausting Remedies Within Club.—Where a member of a political club has demanded of the directors and the officer having the custody of the list of membership of the club the right to inspect such list, and has been refused, he has laid a sufficient ground for an application for a writ of mandamus to enforce his right of inspection. (p. 787.)

MANDAMUS—Parties.—Where an alterative writ of mandamus has been issued against a corporation and two of its officers, but on the return of the writ it appears that one of the officers had no authority to act in the premises, the court may direct a peremptory writ to the corporation, and the other officer who has authority to act. (p. 788.)

C. S. Bartlett and Robert Brannon, for the appellants.

William McLean, for the appellee.

116 MESTREZAT, J. The association known as the Young Republicans of Philadelphia, one of the defendants in this proceeding, was incorporated by a decree of the court of common

pleas No. 1 of Philadelphia county in 1881. The object of the corporation as set forth in its charter is: "To unite in a social and political organization for young men of Philadelphia; to foster and promote a love for, and a knowledge of, the principles of the Republican party; to educate the young men to a loftier appreciation of their relations to the national, state and municipal governments; to encourage them to an active participation in the nomination and election of honest and capable public officers by and through the Republican party."

The plaintiff is, and has been for several years, a member in good standing of the association. In February last, he requested the defendant Harvey, the corresponding secretary of [117] the corporation, to permit him to inspect the list of members and make a copy thereof at a time and place convenient for the purpose. This request being refused, the plaintiff informed the defendant Johnson, the president of the corporation, of the refusal and requested him to authorize Harvey, the corresponding secretary, to allow the inspection to be made. This was also declined, and on March 5, 1904, the plaintiff presented a written communication to the board of directors of the corporation requesting the board to take such action as would afford him an opportunity to inspect the list of members of the association. The board took no action toward granting the request.

Having failed to obtain permission of the directors and officers of the corporation to inspect its list of membership, the plaintiff presented his petition to the court below praying for a mandamus commanding the corporation, its president and corresponding secretary to allow him to inspect the list and make a copy of it. Among the purposes for which the inspection was desired, as averred in the petition, are the following: (a) To institute measures and advocate policies which may tend to promote the objects for which the corporation was organized; (b) to prevent the affairs and property of the corporation from being used to further the private political ambitions of any member or group of members; and (c) to oppose the election or re-election of incompetent officials and to aid in the election of officers who will be faithful to the best interests of the members, and who will administer the affairs of the corporation and control its property in accordance with the purposes for which the corporation was organized.

Separate returns denying the right of the plaintiff to the relief asked were filed by the three defendants. These returns

show that the corresponding secretary is an officer elected by the association and subject to the direction of the board of directors; and that one of his duties is "to keep an accurate roll of the active, nonresident and honorary members of the association, containing, in the case of the active members, the wards and divisions in which they reside." It further appears by the return of the president that neither the constitution nor the by-laws of the association empowers him to authorize the corresponding secretary to permit an inspection of the list of members.

The plaintiff filed demurrers to the returns of the association 118 and corresponding secretary which were sustained by the court below and a peremptory mandamus was directed to issue against the association and secretary. No further action was taken against the president of the corporation.

The appellants contend (1) that the reasons set forth in the petition do not warrant the court in granting a mandamus; (2) that the plaintiff failed to exhaust his remedies under the constitution and by-laws of the association; and (3) that the court could not omit from the peremptory writ a party to the alternative writ.

We do not understand the appellants to controvert the right of a stockholder, under proper circumstances disclosed by his petition, to inspect the records and books of a private corporation. But in this case they deny the sufficiency of the reasons assigned for an inspection of the list of the members of the defendant company by the plaintiff. We are, however, of opinion that the plaintiff is entitled to have furnished him by the appellants a list of the members of the defendant association for the purposes set forth in his petition. These purposes have been quoted above, and it is manifest that they are legitimate and lawful and if carried out will promote the best interests of the association. It is not only the right but the duty of each member of this organization "to institute measures and advocate policies" beneficial to the organization, "to prevent the affairs of the association from being used to further the private political ambitions of a group of members," and "to oppose the election or re-election of incompetent officials." It is for these purposes that the plaintiff demands the right to inspect the list of members of this social and political organization and it is apparent that they are not improper nor hostile to the interests of the association.

We can see no good reason why the officers of this corporation should withhold from any of its members the information

desired by the plaintiff. If the purposes of the association, which are social and political, are to be accomplished and made effective it is necessary that the members should know and communicate with each other. Hence each member should have access to the list of members of the organization, and to deprive him of it is to prevent him from assisting in carrying out the very object for which the corporation was created. [119] Nor is there any sufficient reason shown here why the officers of the association should have access to the roll of members of the organization to the exclusion of the other members. All the members are presumed to be equally interested in promoting the welfare of the association and all should be accorded equal privileges in the association for these purposes. To deny the plaintiff the relief he seeks here is, however, to give the officers of the corporation, the custodians of the list of membership, the opportunity to control the association and to use the list, in the language of the plaintiff's petition, "to further the private political ambitions of any member or group of members." It is, we think, manifest that the list of membership of associations of this character should, at proper times, be open to the inspection of all members, thereby affording to each member an opportunity to aid in carrying out the object of the organization as set forth in its charter.

There is nothing in the contention that the plaintiff failed to exhaust his remedies under the constitution and by-laws of the association to secure the information desired. The petition and returns show that the directors, on written application, failed to furnish the information and that the corresponding secretary, who by the provisions of the constitution is required to, and did, keep a list of the members, refused to permit the plaintiff to inspect it. Having demanded and been refused the information by the board of directors and the corresponding secretary, whose duty required him to keep a list of the membership and who had the list in his possession, the plaintiff laid sufficient ground for the application for this writ. The fact that other officers were required by the constitution to keep a list of the membership of the association is immaterial, as it is not alleged that it required the joint action of all the officers having possession of the list to give the plaintiff permission to inspect it. The corresponding secretary was the proper custodian of the list of membership and refused the plaintiff an inspection and copy of it because, as alleged in his return, he was not, "authorized by the board of directors so to do." As the directors had also refused the plaintiff the information he

desired, it is clear that the latter had made such demand upon the corporation and its officer having the custody of the list as would warrant the court in issuing a mandamus.

120 The name of the president of the corporation was properly omitted from the peremptory writ. This proceeding is regulated by the act of June 8, 1893, Public Laws, 345. The twenty-seventh section of the act provides that "the peremptory writ shall be directed to the same person as the alternative writ save as herein authorized." The seventh section of the act is as follows: "When the writ is sought against a private corporation . . . . the alternative writ shall be directed against the corporation by name, and also against any particular person or body of persons connected therewith whom it may be sought to coerce. . . . . The peremptory writ may be directed to the said corporation, or to the person or body of persons who have the power and whose duty it is to do the act required, or to such superior officer as would be expected to execute the order." It will be observed that the court below followed the provisions of this section of the act in issuing both writs. The alternative writ went out against the corporation and the particular persons connected therewith whom it was sought to coerce. A return to the writ having been made by each of the defendants, it appeared that the corresponding secretary was required by the constitution to keep a list of the membership, but that the president of the corporation had no power to authorize the secretary to permit the plaintiff to inspect and make a copy of the list. It is therefore clear that the corporation, by its directors, and the corresponding secretary are the only parties named in the alternative writ, who, in the language of the seventh section of the statute, had "the power and whose duty it is to do the act required." This being true, the court below very properly directed the peremptory writ to the corporation and corresponding secretary.

The assignments of error are overruled and the judgment is affirmed.

That Mandamus Lies to enforce the right of a stockholder to inspect the books of the corporation, see Fuller v. Hollander, 61 N. J. Eq. 648, 88 Am. St. Rep. 456, and cases cited in the cross-reference note thereto.

The Jurisdiction of Courts over clubs and other voluntary unincorporated societies is discussed in the monographic note to Kearnes v. Howley, 68 Am. St. Rep. 861. And the remedies of members of fraternal and other associations are discussed in the monographic note to Robinson v. Templar Lodge, 59 Am. St. Rep. 198-209; Lahiff v. St. Joseph's etc. Soc., 76 Conn. 648, 100 Am. St. Rep. 1012.

DURHAM v. WICK.

[210 Pa. St. 128, 59 Atl. 824.]

STATUTE OF FRAUDS—Recovery of Money Paid Under Oral Contract.—A vendee can recover from the vendor, for a breach of a parol contract to convey land, so much of the purchase money as has been paid. (p. 791.)

STATUTE OF FRAUDS—Recovery of Money Paid Under Oral Contract.—The refusal of a vendor in a parol contract for the sale of land to execute a conveyance relieves the vendee from the necessity of tendering full payment as a condition precedent to recovering the amount of purchase money already paid. (p. 791.)

STATUTE OF FRAUDS—Recovery of Money Paid Under Oral Contract.—A trustee in bankruptcy may, without tendering the full amount of the purchase price, recover the amount already paid by the bankrupt under a parol contract for the purchase of land, if the vendor refuses to convey to the bankrupt, and, prior to the trial, leases the property to a third person. (p. 792.)

J. D. Marshall and W. Z. Murrin, for the appellant.

T. C. Campbell and W. D. Brandon, for the appellee.

130 POTTER, J. The appellant, L. C. Wick, prior to 1899, was the owner of a planing-mill property in Butler, Pennsylvania. On or about January 10, 1899, he entered into a parol contract with Amos Steelsmith to convey to the latter a one-half interest in this property for four thousand five hundred dollars. In pursuance of this contract Steelsmith gave Wick three promissory notes, payable in six, twelve and eighteen months, for fifteen hundred dollars each. Wick retained possession of the entire property. Subsequently Steelsmith paid one of the notes in full, and five hundred dollars on account of another, in all two thousand dollars.

On March 25, 1901, Steelsmith filed a petition in bankruptcy in West Virginia, where he resided, was adjudicated a voluntary bankrupt and E. A. Durham was appointed trustee of his estate. This suit was brought by Durham, as such trustee, to recover from Wick, the two thousand dollars, paid by Steelsmith on account of the notes, with interest. In defense, Wick averred that he had always been willing to execute and deliver to Steelsmith, or to anyone designated by him, upon payment of the balance of the purchase money, a proper and legal deed for an undivided one-half interest in the mill property, and had so notified the plaintiff. He further claimed that the failure of Steelsmith or his trustee, to tender at any time the un-

paid balance of the purchase money, would prevent the recovery by either of them of the amount actually paid. After the appointment of the trustee in bankruptcy, there was some correspondence between his attorneys, Merrick & Smith of Parkersburg, West Virginia, and Wick. On November 4, 1902, they wrote him a letter in which they referred to a previous letter, containing a suggestion that he should buy Steelsmith's interest in the property and in the meantime pay a reasonable rent for the use of the one-half interest, and requested an answer. On November 6, 1904, J. D. Marshall, an attorney of Butler, wrote to Merrick & Smith, saying that Wick had handed him their letter of the 4th inst., that Steelsmith had no interest in Wick's property; that there was a verbal agreement by which Wick agreed to [131] convey to Steelsmith an undivided one-half interest upon payment of a certain sum, of which only a small part had been paid; that upon payment in full of the purchase money and interest, Wick would keep his word with Steelsmith and convey to him the property, but to no one else; and that Wick would not accept any pro rata of the purchase money, nor convey to any other person than Steelsmith, as the latter had no interest that could be conveyed or taken for debt.

It appears from the evidence that on March 25, 1904, after suit brought and before the trial, which began April 21, 1904, the defendant leased the property in question to the Iceless Refrigerator Company for the term of one year.

Upon the trial the court declined to give binding instructions for the defendant and instructed the jury (1) that if they believed that the letter from Marshall to Merrick & Smith, dated November 6, 1902, was authorized by Wick, it was a refusal by Wick to recognize the interest of the plaintiff in the property or to make a deed to him, and entitled the plaintiff to recover from Wick the purchase money paid by Steelsmith; and (2) that if they found that, under the parol contract, the title of the property was to be in fee simple, free of all encumbrances, the lease to the Iceless Refrigerator Company was inconsistent with the tender of the deed by defendant, and placed defendant in a position where he could not carry out his contract. The jury found for the plaintiff for the full amount of his claim with interest.

The first and controlling question to be determined is whether or not the letter of November 6, 1902, written in behalf of Wick, was such a refusal to carry out the terms of the contract of sale on the part of the vendor, as would enable

the vendee, or his trustee, to rescind, and sue for the purchase money paid on account. Of course, if the vendor had in no way repudiated the contract, the vendee would be obliged to tender the entire amount of the purchase money, before he would be entitled to disaffirm, and sue for the amount already paid on account. But, on the other hand, the refusal of the vendor to perform his part of the contract, would discharge the vendee from further responsibility and entitle him to claim at once repayment of the part of the purchase money previously paid. In Milligan v. Dick, 107 Pa. St. 259, Justice 132 Trunkey said (page 265): "No principle is better settled than that the buyer can recover from the seller, for breach of a parol contract to sell and convey land, so much of the purchase money as was actually paid."

Was there then a breach in this case upon the part of the vendor? Turning to his letter of November 6, 1902, we find that Wick, through his attorney, declared explicitly that Steelsmith had no interest whatever in the property. And while admitting the verbal agreement for the sale to him of a half interest, stated that he would only convey to Steelsmith personally and to no one else; and refused to make a deed to any other person. The trustee could only have understood this letter as a flat and specific refusal to convey the interest in the property to him, and he was, we think, justified in regarding it as a breach of the contract, by the vendor, and a relinquishment of his right to further performance by the vendee. The intention upon the part of Wick to ignore the contract, in so far as making under it a deed to the plaintiff is concerned, could hardly have been more plainly stated. The letter expressed a determination to prevent the trustee, and through him the creditors, from obtaining any interest in the property, upon the theory that the contract, not being in writing, could not be enforced in law. Refusal to convey to the trustee under such circumstances was a repudiation of the agreement to convey to Steelsmith for "stated broadly, the rule is that the trustee takes all the property of the bankrupt, whether in possession or in action, at the time the petition was filed": Collier on Bankruptcy, 4th ed., 509. Having refused to convey to the trustee, the defendant ought not to complain that he was taken at his word. By his action, he relieved the plaintiff of the necessity of tendering the full amount of the purchase money. The present action is in disaffirmance of the contract, by reason of the failure of the vendor to perform. As

was said by this court in Bell v. Kennedy, 100 Pa. St. 215, 221: "If this action were in affirmance of the contract, it would be necessary to show a readiness or willingness on the part of the vendee to perform, but it is in disaffirmance thereof by reason of the inability and failure of the vendor to perform. His performance was a condition precedent to his right to require any payment from the vendee. [133] The latter therefore had the right to recover the money which he paid under a misapprehension, and which the vendor was not entitled to receive: Moore v. Shelly, 2 Watts, 256; Robison v. Tyson, 46 Pa. St. 286; Crossgrove v. Himmelrich, 54 Pa. St. 203."

In the last cited case, Justice Thompson said (page 209): "The defendants contend that there was not (a proper case for rescission shown) because the plaintiffs did not tender at the time they claimed to rescind the contract, an entire performance on their part. An offer of a readiness or willingness to pay for the hay would have been material if the action had been in affirmance of the contract: Robison v. Tyson, 46 Pa. St. 286. But this is an action in disaffirmance of the contract, to recover back the price paid. A tender or offer of the money which would be due on the completion of the contract was not essential when it appeared otherwise that the plaintiff had fully complied with his part of the contract up to the time of electing to rescind it. . . . . Here was a failure to complete the contract by the defendants, and under these circumstances the plaintiffs were entitled to rescind and to recover so much money as they had advanced on the contract beyond the hay received."

So in Forsyth v. North American Oil Co., 53 Pa. St. 168 (174), it was held that a refusal by the vendors, in a contract of sale, to deliver the goods agreed to be sold excused the vendees from the necessity of tendering payment, in order to recover the money paid.

In the present case, our conclusion is that the vendor was in default, by reason of his refusal to convey to the trustee. and that this default rendered unnecessary a tender of the full amount of the purchase money by the vendee, before rescinding the contract. Then again the conduct of the vendor in leasing the property to a third party, prior to the trial, was evidence not only of his unwillingness, but of his inability to carry out at that time the original contract. The lease constituted an encumbrance upon the title: Cross v. Noble, 67 Pa. St. 74; Wilson's Appeal, 109 Pa. St. 606.

We find nothing in the specifications of error which would justify us in sustaining any of them. They are all overruled, and the judgment is affirmed.

RECOVERY OF MONEY PAID UNDER A CONTRACT UNENFORCEABLE BY THE STATUTE OF FRAUDS.

I. Repudiation of Contract by Vendor, 793.
II. Willingness of Vendor to Perform, 793.
III. Willingness of Vendee to Perform, 794.
IV. Tender and Demand of Performance, 794.
V. Possession by Vendee, 795.
VI. Misrepresentation by Vendor, 795.
VII. Destruction of Buildings on Premises Purchased, 796.
VIII. Sale of Timber, 796.
IX. Purchase of Land for Benefit of Third Person, 796.
X. Lease of Real Property, 796.
XI. Form of Action for Recovery, 796.
XII. Limitation of Actions, 797.
XIII. Lien of Vendee on Land Purchased, 797.
XIV. Interest on Money Paid, 797.

I. Repudiation of Contract by Vendor.—If part or all of the purchase money is paid under a parol contract for the sale of real estate, or if earnest money is advanced, and the vendor for any reason refuses to carry out the contract, or is unable to do so, the vendee may recover back the money which he has paid or advanced. The vendor, when he repudiates the contract, cannot invoke the aid of the statute of frauds to enable him to retain the money which he has received: Littell v. Jones, 56 Ark. 139, 19 S. W. 497; Morris v. Goodwin, 1 Ind. App. 481, 27 N. E. 985; Kneeland v. Fuller, 51 Me. 518; Segars v. Segars, 71 Me. 530; Wetherbee v. Potter, 99 Mass. 354; Riley v. Williams, 123 Mass. 506; Davis v. Strobridge, 44 Mich. 157, 6 N. W. 205; Pressnell v. Lundin, 44 Minn. 551, 47 N. W. 161; Payne v. Hackney, 84 Minn. 195, 87 N. W. 608; Gillett v. Maynard, 5 Johns. 85, 4 Am. Dec. 329; Barnes v. Brown, 71 N. C. 507; Durham etc. Impr. Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952; Buck v. Waddle, 1 Ohio, 357; Milligan v. Dick, 107 Pa. St. 259, 265; Crippen v. Bearden, 24 Tenn. (5 Humph.) 129; Sneed v. Bradley, 4 Sneed, 301; Love v. Burton (Tenn.), 61 S. W. 91; Moore v. Powell, 6 Tex. Civ. App. 43, 25 S. W. 472; Gifford v. Willard, 55 Vt. 36; Brown v. Pollard, 89 Va. 696, 17 S. E. 16; Brandeis v. Neustadtl, 13 Wis. 142; Thomas v. Sowards, 25 Wis. 631.

II. Willingness of Vendor to Perform.—This right of a vendee to recover money paid under an oral contract for the sale of real property is generally regarded as confined to those cases where the vendor refuses or is unable to carry out the contract on his part, the vendee

having performed or tendered performance. If the vendor is ready, willing, and able to fulfill the contract, the vendee cannot, according to the weight of authority, recover back the money he has advanced: Laffey v. Kaufman, 134 Cal. 391, 86 Am. St. Rep. 283, 66 Pac. 471; Lewis v. Whitnell, 21 Ky. (5 T. B. Mon.) 191; Dougherty v. Goggin, 24 Ky. (1 J. J. Marsh.) 373; Craig v. Prather, 41 Ky. (2 B. Mon.) 9; Coughlin v. Knowles, 48 Mass. (7 Met.) 57, 39 Am. Dec. 759; McKinney v. Harvie, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; Sims v. Hutchins, 8 Smedes & M. 328, 47 Am. Dec. 90; Galway v. Shields, 66 Mo. 313, 27 Am. Rep. 351; Lane v. Shackford, 5 N. H. 130; Eaton v. Eaton, 35 N. J. L. 290; Dowdle v. Camp, 12 Johns. 451; Collier v. Coates, 17 Barb. 471; Cammack v. Prather (Tex. Civ. App.), 74 S. W. 354; Cobb v. Hall, 29 Vt. 510, 70 Am. Dec. 432; York v. Washburn, 118 Fed. 316, 129 Fed. 564.

The case of Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311, seems to be opposed to the general trend of authority on this question. See, too, Collins v. Thayer, 74 Ill. 138; Tucker v. Grover, 60 Wis. 233, 238, 19 N. W. 92. And so are the decisions of Alabama. "It is true," said Chief Justice Brickell in Flinn v. Barber, 64 Ala. 193, "that the weight of authority, English and American, confines the right of a vendee of lands, who has entered into a verbal agreement of purchase, to recover money paid, or to reclaim any other consideration with which he has parted, to cases of the refusal or the inability of the vendor to complete the contract: Browne on Statute of Frauds, sec. 122; Chitty on Contracts, 928. That is not, however, the doctrine which this court adopted at an early day, and which has been uniformly recognized whenever the question has been directly presented."

III. Willingness of Vendee to Perform.—A vendee cannot, according to the better rule, refuse to take a conveyance of land in accordance with a parol agreement, and recover back the purchase money which he has advanced: Day v. Wilson, 83 Ind. 463, 43 Am. Rep. 76; Dudley v. Hayward, 11 Fed. 543. See, also, Morris v. Derr, 55 Kan. 569, 40 Pac. 908. He must, ordinarily, tender performance and be refused a conveyance, before he is entitled to a return of his money: Laffey v. Kaufman, 134 Cal. 391, 86 Am. St. Rep. 283, 66 Pac. 471; Crabtree v. Welles, 19 Ill. 55. Compare Collins v. Thayer, 74 Ill. 138. The vendee is excused from tendering performance, however, when the vendor has refused to make a conveyance (see the principal case, ante, p. 789; Welch v. Darling, 59 Vt. 136, 7 Atl. 547), or when he has conveyed the property to a third person and thereby made performance on his part impossible: Bennett v. Phelps, 12 Minn. 326.

IV. Tender and Demand of Performance.—The necessity of a vendee himself tendering performance as a condition precedent to recovering back moneys paid under a parol contract for the sale of real estate has already been considered: See "Willingness of Vendee

to Perform," ante. It is said in Nelson v. Shelby Mfg. etc. Co., 96 Ala. 515, 38 Am. St. Rep. 116, 11 South. 695, that the vendee may recover back the amount he has paid, without previous demand. But in Abbott v. Draper, 4 Denio, 51, it is said that an action for the recovery cannot be sustained without proof of a demand of the money advanced before suit brought. The demand, if necessary, need not be put upon the ground that the contract is invalid under the statute of frauds, but it must so refer to the money that the vendor may understand that it is the money paid under such contract: Tucker v. Grover, 60 Wis. 233, 19 N. W. 92. In case the vendor has, after making the verbal agreement to sell, conveyed the property to a third person, the vendee need not demand a conveyance before bringing suit: Bennett v. Phelps, 12 Minn. 326.

V. Possession by Vendee.—The fact that a vendee in a parol contract for the sale of real estate has been put in possession of the premises will not defeat his right to recover payments of the purchase money upon the refusal of the vendor to execute a conveyance: Jellison v. Jordan, 68 Me. 373; Wyvell v. Jones, 37 Minn. 68, 33 N. W. 43. He cannot recover, however, if the vendor does not repudiate the contract: Donaldson v. Waters, 30 Ala. 175. An action for recovery cannot be maintained until the possession of the land is restored: Abbott v. Draper, 4 Denio, 51. And the amount of the benefit received by the vendee from the possession will be deducted from the amount of the recovery: Richards v. Allen, 17 Me. 296; De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938. If he has materially affected the value of the premises by cutting valuable timber, so that the vendor cannot be restored to his original rights, this may prove an insuperable obstacle to the recovery of payments made: Cilley v. Burkholder, 41 Mich. 749, 3 N. W. 221. There was such part performance in this case as to entitle the contract to be recognized and enforced in equity. Some authorities hold that the vendee can recover nothing for his labor and improvements which he puts upon the property while in possession: Gillet v. Maynard, 5 Johns. 85, 4 Am. Dec. 329; Bedell v. Tracy, 65 Vt. 494, 26 Atl. 1031. See, too, Shreve v. Grimes, 4 Litt. (Ky.) 220, 14 Am. Dec. 117. We are unable to see the justice of such a rule, and are inclined to believe that the vendee may not only recover such money as he has advanced on the purchase price, but that he may also recover for labor and funds expended in making improvements, less the rents and profits enjoyed by him: McCampbell v. McCampbell, 5 Litt. (Ky.) 92, 15 Am. Dec. 48; Fox v. Longly, 1 A. K. Marsh. (Ky.) 388; Barnes v. Brown, 71 N. C. 507; Miller v. Metz, 103 Wis. 220, 79 N. W. 213.

VI. Misrepresentation by Vendor.—Where a vendee is induced to enter into a verbal contract for the purchase of land by a false representation by the vendor as to a material fact, he may maintain an action to recover back a part payment made under the oral agreement: Hellman v. Strauss, 2 Hilt. (N. Y.) 9.

VII. Destruction of Buildings on Premises Purchased.—If a vendee pays a portion of the purchase price under a parol agreement for the sale of real estate, but there is not such part performance as takes the contract out of the statute of frauds, and the buildings are destroyed by fire before the conveyance is consummated, the vendee may recover back the purchase money advanced: Blew v. McClelland, 29 Mo. 304.

VIII. Sale of Timber.—The authorities are not entirely harmonious on the question whether a sale of growing timber is within the operation of the statute of frauds: See Emerson v. Shores, 95 Me. 237, 85 Am. St. Rep. 404, 49 Atl. 1051; Kirkeby v. Erickson, 90 Minn. 299, 101 Am. St. Rep. 411, 96 N. W. 705; Seymour v. Cushway, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769. But if such sales are regarded as within the statute, the vendee under a parol contract of purchase may, upon the repudiation of the agreement by the vendor, recover the purchase money which he has paid: Terrell v. Frazier, 79 Ind. 473; Herrick v. Newell, 49 Minn. 198, 51 N. W. 819. In this latter case the vendor incapacitated himself to perform the contract by conveying the land, including the timber, to a third person.

IX. Purchase of Land for Benefit of Third Person.—Where money is paid under a parol agreement for the sale of land which is to go to a third person, he cannot, upon the rescission of the contract by the vendor, recover such money; the right of recovery belongs to the person who paid it: Beamen v. Buck, 17 Miss. (9 Smedes & M.) 207. But where A pays C a part of the purchase price of land, at the request of B, and upon his promise to repay it, he can recover the amount of such money from B, although by a parol agreement of the parties the title, upon the making of full payment, was to be taken in the name of A for the benefit of B: Whitman v. Lake, 32 Wis. 189. See, too, Johnson v. Krassin, 25 Minn. 117.

X. Lease of Real Property.—The rule that when a vendor, under a parol agreement for the sale of lands, is willing and ready to perform on his part, but the vendee refuses to perform and repudiates the agreement, the latter is not entitled to recover an installment of purchase money previously paid, is applied in York v. Washburn, 129 Fed. 564, to an action by a lessee to recover earnest money paid on an oral contract for the letting of real estate for more than a year.

XI. Form of Action for Recovery.—The money paid by a vendee on a parol contract for the sale of land may be recovered back in an action of assumpsit for money had and received, when the vendor declines or is unable to perform the contract on his part: Allen v. Booker, 2 Stew, 21, 19 Am. Dec. 33; Hunt v. Sanders, 8 Ky. (1 A. K. Marsh.) 552; Bedinger v. Whittamore, 25 Ky. (2 J. J. Marsh.)

552. The recovery is not upon the parol contract, but for the money had and received by the vendor for which he has returned no consideration through his refusal to perform: Allen v. Booker, 2 Stew. 21, 19 Am. Dec. 33; Bedell v. Tracy, 65 Vt. 494, 26 Atl. 1031. It is well to note, in this connection, that the mere payment of the purchase money, in whole or in part, does not take the contract out of the operation of the statute of frauds and make it obligatory upon the vendor, and if the vendee cannot recover such payment when the vendor repudiates the agreement, he is remediless: Nelson v. Shelby Mfg. etc. Co., 96 Ala. 515, 38 Am. St. Rep. 116, 11 South. 695; Cooper v. Colson, 66 N. J. Eq. 328, ante, p. 660, 58 Atl. 337. Where a vendee brings a suit for specific performance of a contract to convey land, and the vendor admits the making of an unwritten agreement and sets up the statute of frauds, the vendee, under his prayer for general relief, may be allowed to recover the amount he has paid: Wilkie v. Womble, 90 N. C. 254.

XII. Limitation of Actions.—The right of action of a vendee to recover payments made under a parol contract for the sale of land does not accrue, and the statute of limitations does not begin to run against it until the vendor repudiates the contract. The contract being merely voidable, and not void, the vendee is entitled to rely upon it until the vendor declines to perform on his part and thereby terminates the contract; and when he manifests an intention to terminate it, the statute of limitations is set in operation against an action to recover back such moneys as have been advanced by the vendee: Collins v. Thayer, 74 Ill. 138; Walker v. Walker, 21 Ky. Law Rep. 1521, 55 S. W. 726; Lyttle v. Davidson, 23 Ky. Law Rep. 2262, 67 S. W. 34.

XIII. Lien of Vendee on Land Purchased.—When land has been sold by a parol contract, the vendee, at least if he has been put in possession, has a lien on the land for the purchase money paid, upon the rescission of the contract by the vendor: Brown v. East, 5 T. B. Mon. 405; Lyttle v. Davidson, 23 Ky. Law Rep. 2262, 67 S. W. 34; Vaughn v. Vaughn, 100 Tenn. 282, 45 S. W. 677. And this lien will prevail against a subsequent purchaser with notice: Clough v. Clough, 42 Ky. (3 B. Mon.) 64; Walker v. Walker, 21 Ky. Law Rep. 1521, 55 S. W. 726; Rhea v. Allison, 3 Head (Tenn.), 176; and it will cover not only the purchase money advanced, but also the value of improvements less the rents and profits, and also interest: Rhea v. Allison, 3 Head (Tenn.), 176; Hilton v. Duncan, 1 Cold. (Tenn.) 313. A parol purchaser who has never been placed in possession cannot, it is held, assert such a lien: Bishop v. Martin, 23 Ky. Law Rep. 1494, 65 S. W. 807.

XIV. Interest on Money Paid.—When a vendor under a parol contract to convey real estate declines or is unable to complete the contract on his part, the vendee is entitled to have payments which

he has made refunded with interest: Sneed v. Bradley, 4 Sneed, 301; Hilton v. Duncan, 1 Cold. (Tenn.) 313; Vaughn v. Vaughn, 100 Tenn. 282, 45 S. W. 677. It is held, however, that interest should not be allowed so long as the vendee was permitted to enjoy the land without being accountable for the rents: Fox v. Longly, 1 A. K. Marsh. 388.

NEW CASTLE v. KURTZ.

[210 Pa. St. 183, 59 Atl. 989.]

MUNICIPAL CORPORATIONS—Reimbursement for Damages Paid.—The principle underlying the right of a city to be reimbursed by an abutting property owner for damages paid to a person injured upon a dangerous pavement is that the property owner is primarily liable to the injured person. (p. 799.)

MUNICIPAL CORPORATIONS—Icy Sidewalk—Duty of Abutting Owner.—The owner of premises, out of possession, with the pavement in proper repair and the properties properly constructed and also in proper repair, is not bound to keep watch and guard over the pavement to prevent the formation of ice upon it, and is not liable for an injury consequent upon a sudden accumulation of ice thereon. (p. 800.)

MUNICIPAL CORPORATIONS—Icy Sidewalk—Liability of Abutting Owner to City.—An owner of city property occupied by a tenant is not liable to the municipality for the amount of a verdict recovered against it by a person injured on an icy ridge on the pavement in front of the premises, if the pavement was in a proper state of repair; and the owner had no notice of its icy condition, while the city had and failed to remedy it, and the ice was due to unusual weather. (p. 801.)

James A. Gardner, city solicitor, and Robert K. Aiken, for the appellant.

S. W. Dana, D. B. Kurtz, Aaron L. Hazen, Oscar L. Jackson and Richard F. Dana, for the appellees.

186 THOMPSON, J. This was an action by the appellant to recover from the appellees the amount of a verdict that it was by suit compelled to pay to a person who had been injured by a fall caused by a ridge of ice formed in front of and upon the pavement of the properties owned by the appellees and occupied by tenants. The liability of the appellant in that action sprang from the actual notice to it of the dangerous condition of the ice upon the pavement and after such notice its neglect to remove it. The proof there was that its street commissioner had express notice of the ridge of ice that caused the accident

and its dangerous character. Having such notice and having failed to perform its duty and having been mulcted in damages for such failure of duty, appellant now seeks to recover the amount of such damages from appellees, who had no notice or knowledge of the condition of the ice on the pavement and whose properties were in the occupancy of tenants.

The principle underlying the right to be reimbursed for damages paid by a municipality in cases of accident is that the owner or occupier of the property, as the case may be, is primarily liable to the person injured. The right of subrogation springs from that liability. The primary liability in that case was upon the appellant. It assumed the duty of removing the ice. By its ordinance it required owners, tenants or occupiers of properties to remove the ice in front of the same before 10 o'clock of the next day after its accumulation and failing to do so to be liable to a fine, and in case the owner or [187] occupier did not remove when so required, it undertook to do so. The appellant having undertaken that duty had express notice of the condition of the ice and the necessity for its removal. Thus its negligence arose directly from its failure to perform it. It now practically seeks to have a right of subrogation for repayment of the damages which were the direct consequence of its own negligence. It is an attempt therefore to make a wrong and not a right, the basis of such subrogation.

In Smith's Public Corporations, volume 2, section 1305, it is said: "But when a charter imposes upon lot owners the duty of keeping the sidewalk in repair, and free from snow or ice or other obstructions, and also provides that the superintendent of streets should repair any sidewalk where the owner of the property neglected to repair the same for a fixed number of days after the service upon him of a written notice so to do, and that the superintendent should collect the expense of such repair from the owner of the property, it only imposes upon the owner a statutory liability for the expense of such repairs. It does not directly and specifically make him liable for any damages in case of personal injuries to persons from a failure to keep such sidewalks in repair and the municipality, though it may in an action be held liable to the person injured and pay the same, cannot maintain the action against the lot owner for indemnity." He there cites numerous authorities to sustain the above.

The failure of the appellant to remove the ice ridge in question with notice of its dangerous condition or to give notice to

the tenants to remove it promptly, or in case of their failure, to do so at their expense, negatives an equal liability basis upon which to build a right in equity for subrogation, against the appellees, the owners of the property, not in occupancy, and without the slightest knowledge or information in regard to the condition of the pavement, but in any contingency the right to reimbursement by appellant could only spring from a liability of the appellees, which Dean, who recovered a verdict against the appellant, might have enforced against them. They were the owners of the properties and their tenants were and had been for many years the actual occupiers of them. The accident [188] was not caused by the bad condition of the pavement or its want of repair, but by a sudden accumulation of ice to which water from the buildings may have contributed. It was an unusual condition produced by the elements and seemed to have had no similar recurrence in a period of many years. Whatever the duties of the tenants to keep the pavements free and clear of ice may have been, the appellees, out of possession, with the pavement in proper repair and the properties properly constructed and also in proper repair, were not bound to keep watch and guard over the pavement to prevent the formation of ridges of ice upon it, and if so they cannot be held liable for an injury consequent upon a sudden accumulation of ice there.

In Lohr v. Philipsburg Borough, 156 Pa. St. 246, 27 Atl. 133, Mr. Justice Mitchell said: "In the recent case of Burns v. Bradford City, 137 Pa. St. 361, 20 Atl. 997, 11 L. R. A. 726, our Brother McCollum said: 'A municipal corporation is not an insurer against all defects in its highways, but it is answerable for negligence in the performance of its duties in the construction and care of them. For a defect arising in them without its fault or neglect, it is not liable, unless it has express notice, or the defect be so notorious as to be evident to all passers.'" It was accordingly held in that case that although "It is a fact well known to the inhabitants of all our municipalities that sidewalks are liable in the winter to be thrown out of level by the action of the frost," yet the plaintiff, who was injured very much in the same manner as the present plaintiff was, by the stringers of a plank walk being raised higher on one side than the other, could not recover without proof that the defect was observable by all passers. So here, the proper instruction to the jury should be that the borough was bound to keep a reasonable supervision over the

condition of its sidewalks, but it was not liable for negligence unless it had actual notice or knowledge of the defect complained of, or it was so plain to observation and had existed so long a time that officers exercising a reasonable supervision ought to have observed it.

The primary liability on the part of the owner out of occupancy may arise where the injury is the result of negligence springing from a failure to repair a pavement, but where no such condition exists and there is no failure of duty in regard 189 to any repairs, no negligence can be said to be attributed to him. There was no evidence in this case that the pavement was in a bad condition or out of repairs and none that there was danger by reason of the failure to construct across it a gutter to the street. No such gutters were laid across pavements in the locality and none required. This is apparent from the fact that there was no proper storm gutter in the street to carry off water, and especially so in the case of appellees' pavement, as a telegraph pole over a foot in diameter had been erected, under the direction of appellant's engineer, directly opposite the waterspout from appellees' property, which precluded the construction of a small gutter. It is, however, manifest that if even a small gutter had been constructed across the pavement, under the stress of the intense weather which caused the ridge of ice upon the pavement, it would not have successfully operated to prevent such accumulation. It follows, then, that unless there was a failure of duty on the part of the appellees in the construction of a water pipe as resulted in a nuisance per se, continuing as such, no liability on their part could arise. The conductor or waterspout was constructed at the time of the erection of these houses some twenty years previous, was such as was in common use, was proper and necessary to remove water from the roof of the houses, and was so recognized. As its construction was proper, and as it was used for a necessary purpose, and as it was not out of repair, it was not a nuisance per se, and the fact that a severe storm at some remote period of time might possibly cause an unusual flow of water would not necessarily make it so.

There is no evidence that any such flow ever previously made any mischief. Such being the case, there was no such failure of duty on the part of appellees as to be the foundation of any liability.

The case of Brown v. White, 202 Pa. St. 297, 51 Atl. 962, 58 L. R. A. 321, was a case in which the construction was a

nuisance per se, and the owner's liability was placed distinctly upon that ground, and Mr. Justice Mestrezat, quoting from the case of Knauss v. Brua, 107 Pa. St. 85, says: "But the converse of this proposition is also true; if the premises are so constructed, or in such a condition that the continuance of their use by the tenant must result in a nuisance [190] to a third person, and a nuisance does so result, the landlord is liable."

The learned trial judge was not guilty of error in giving binding instructions for the appellees, and this judgment is affirmed.

Mestrezat and Potter, JJ., dissent.

A Municipal Corporation **is said to be only secondarily liable for defective sidewalks, while the abutting property owner is primarily responsible: Dutton v. Landsdowne, 198 Pa. St. 563, 82 Am. St. Rep. 814. See, however, Baustian v. Young, 152 Mo. 317, 75 Am. St. Rep. 462. As to the right of the municipality to compel the abutting owner to reimburse it for damages paid by it to a person injured in consequence of a defective sidewalk, see the note to Browning v. Springfield, 63 Am. Dec. 356; St. Louis v. Connecticut etc. Ins. Co., 107 Mo. 92, 28 Am. St. Rep. 402; Pawtucket v. Bray, 20 R. I. 17, 78 Am. St. Rep. 837. As to the liability of a city for allowing ice to accumulate and remain on sidewalks, see Magha v. Hagerstown, 95 Md. 62, 93 Am. St. Rep. 317; monographic note to Dudley v. Flemingsburg, 103 Am. St. Rep. 290. And as to the relative liability of the lessor and the lessee of abutting property in respect to the icy condition of the sidewalk, see the monographic note to Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 540.**

HENRY v. BLACK.

[210 Pa. St. 245, 59 Atl. 1070.]

SPECIFIC PERFORMANCE—Form of Bill.—A bill for specific performance should be a simple statement of the essential facts of the case. (p. 803.)

STATUTE OF FRAUDS—Description of Real Estate.—A receipt for a part of the purchase money of a well-known city hotel property, which specifically designates the hotel by name, is a sufficient memorandum to satisfy the statute of frauds. (p. 805.)

STATUTE OF FRAUDS—Sale of Realty—Written Authority of Corporate Officer.—An officer of a corporation, the business of which is dealing in real estate and taking options, authorized to take an option in his own name, may, without written authority, sell the property to a purchaser. (p. 808.)

SPECIFIC PERFORMANCE by First Purchaser.—Where the treasurer of a corporation, the business of which is dealing in real

estate and taking options, takes an option, with authority from his company, in his own name, to purchase real property, the vendor agreeing to pay the company a fee, and then sells the property, giving a receipt in the name of the corporation to the vendee for a portion of the purchase money; and subsequently the treasurer takes a conveyance of the property in his own name, and makes a deed to a third person having knowledge of the previous transaction, and agreeing to pay a fee to the corporation, the first purchaser may have specific performance against the original owner, the second purchaser, the corporation, and the treasurer. (p. 808.)

W. A. Stone and Stephen Stone, for the appellants.

Henry A. Davis, Reed, Smith, Shaw & Beal, S. S. Mehard and Ralph Longenecker, for the appellees.

247 DEAN, J. This is a bill to compel the specific enforcement of a contract for the sale of land. The bill of complainants is met by a demurrer in which defendants aver: 1. That the bill does not set out sufficient facts to make it cognizable in a court of equity; 2. That it does not set out sufficient facts to entitle plaintiffs to the relief prayed for; 3. That bill does not set out any contract in writing, nor any contract enforceable specifically in a court of equity.

The bill should be a simple statement of the essential facts of the case: Winebrenner v. Colder, 43 Pa. St. 244.

The facts averred in the bill are these: That Sarah L. Black, one of the defendants, on January 7th and for years prior thereto, was the owner in fee simple of a lot of ground on the corner of Smithfield street and Virgin alley, in the city of Pittsburg, known as the Hotel Duquesne property; that plaintiffs owned the Hotel Henry property adjoining the Hotel Duquesne; the Union Realty Company is engaged in the business of buying and selling on commission the property of owners. On May 7, 1903, Sarah L. Black gave to R. J. Coyle, stockholder and treasurer of the Union Realty Company, and to his nominee and assigns an option for thirty days on the Hotel Duquesne property at the price of $800,000, payable $25,000 cash, the balance $775,000 to be secured by bond and mortgage for ten years bearing interest at four per cent payable semi-annually. Sarah L. Black agreed to pay the Union Realty Company $10,000 if sale was made. Coyle and one John K. Ewing, a director of the company, then sold to Annie E. Henry the Hotel Duquesne property on June 1st following, within thirty days, at the exact price specified in the option of Mrs. Black to Coyle, but substituting as the vendor the Union Realty Company. This is a copy of the writing delivered to Mrs. Henry:

"June 1st, 1903. Received from Mrs. Annie E. Henry five thousand dollars ($5,000) hand money on account of sale of Hotel Duquesne property as per agreement made this day.

(Signed) "UNION REALTY COMPANY.

"$5,000 Per J. K. EWING."

The negotiations for the sale were made and carried on by and through Ewing and Coyle; the $5,000 named in the receipt [248] or contract was paid them; the plaintiffs on June 5, 1903, within five days, tendered to Sarah L. Black $25,000 in cash and a purchase money mortgage payable with interest as stipulated in her option and demanded a deed; she refused to accept the money or deliver a deed; in five days after filing this bill and ten days after plaintiffs tendered to her the cash, mortgage and bonds, Mrs. Black executed and delivered to Coyle a deed for the property, received from him the $25,000 cash with the mortgage and bond in the sum of $775,000; the same day Coyle executed to A. W. Mellon his deed for the property for the consideration agreed to be paid by Mrs. Henry to the Union Realty Company. Mellon took the deed with the full knowledge of the previous negotiations and transactions between Coyle and Mrs. Black, and between Coyle, Ewing, the Union Realty Company and Mrs. Henry. The Union Realty Company received from Sarah L. Black $10,000 commissions on the first sale of the property to Mrs. Henry; either the company or Coyle for the company received an additional commission from Mellon for the sale of the property to him.

These are the facts averred, either within the knowledge of plaintiff or on information and belief. The defendants have only demurred, therefore we must take them as true—at least so far as concerns the issue raised by this appeal. Then, as a fact, the Union Realty Company did declare to D. F. and Annie E. Henry that it was the owner of an option with the power to sell the Hotel Duquesne property and made a sale in writing signed by it of property to Mrs. Henry, who made a payment of $5,000 down, which the company by its agent received. The bill avers the full price was to be $800,000; the writing states that the $5,000 was on account of sale of Duquesne Hotel property as per agreement made this day. This was not, as appears from the receipt, a very explicit statement of the full consideration, for when bill and receipt are read together the consideration was much larger and the method of payment was fully set out and agreed upon. The demurrer, in effect, admits the contract in all its details. But aside from

the full averments in the bill, which are not a part of the receipt, we have a writing reciting a sale of specific property, identifying it by name, and an actual payment of $5,000 of the consideration. If the description was sufficiently certain, this was [249] a complete contract between the Union Realty Company to sell the Hotel Duquesne property and on the part of Mrs. Henry to buy it at a price exceeding $5,000. Was the description sufficiently certain? The hotel was a prominent one, on one of the principal streets of Pittsburg; probably three-fourths of the citizens of Pittsburg know of its exact location. But that, under the authorities, is not sufficient. Is the description in the writing full enough to enable a court to make a decree of specific performance of the contract? The identity of the location is fixed by the name of the hotel. Given the hotel site, the lots on which it stands and the ground properly appurtenant to it can be ascertained by measurement to a certainty. Our records in rural counties are full of deeds which describe thousands of tracts of land conveyed only by their warrantee names; no one thinks of objecting to them for insufficiency of description. If a dispute arises, a survey identifies their location; a copy of the official survey from the land office establishes their exact boundaries and quantities of land. So here, the identity of the hotel site being fixed, the city and county records establish the boundaries and quantity. This contract, then, clearly identified the subject of it; that identification furnished the purchaser or a court the means of making clear the boundaries and quantity of land. This, since Wilson v. Clarke, 1 Watts & S. 554, and especially since McFarson's Appeal, 11 Pa. St. 503, which gave authoritative interpretations of our statute of 1772, as compared with the British statute of frauds, has been held a sufficient memorandum in writing to escape the inhibition of the statute of frauds, and such has been the ruling in the long line of cases since the decisions in these two cases. What was said of the contract in the last-named case may be said of the one in this: "It is in writing, is sufficiently certain and defined in every required particular inclusive of the question of estate to be conveyed, was made by parties able to contract upon a valuable consideration, and imports to be fair and equal. Why should it not then be executed?"

Up to this point, then, these facts distinctly appear as averred in the bill: that the Union Realty Company, professing to be the owner of the Hotel Duquesne property, sold it

by a memorandum in writing to the plaintiff. It is further averred that Mrs. Black, the original owner, had on May 7, [250] 1903, given to R. J. Coyle, Jr., a full and complete written option for the sale of the property at the price of $800,000; of this $25,000 was to be cash and the balance, $775,000 was to be paid in ten years, with interest at four per cent to be secured by bond and mortgage upon the property. The option was to continue for thirty days. Coyle was a stockholder, treasurer and employé of the Union Realty Company. Sarah L. Black further agreed with the Union Realty Company, through its officer and employé Coyle, to pay to the company a commission of $10,000. The conveyance of the property, by the option, was to be made to Coyle or to his nominee or assigns. It will be noticed by paragraph 4 of the amendment to the bill it is averred that Mrs. Black agreed with the Union Realty Company to pay to it this $10,000 as commission for the sale of the property at the price named; further, in paragraph 3 it is averred, in substance, that the realty company authorized its employés in the transactions of its business to obtain options. The averments in the bill, although unskillfully if not carelessly drawn, yet show clearly enough to be obvious that Coyle took the option for the corporation of which he was a stockholder, officer and employé. Coyle and Ewing—the latter a stockholder and director in the company—then with Mrs. Black's option in their possession representing the property as that of the Union Realty Company, opened negotiations with Mrs. Henry, the plaintiff and purchaser of the hotel. Mrs. Henry agrees to buy at exactly the same price as that stipulated for by Mrs. Black in her written option. A memorandum in writing is made as heretofore quoted signed by the Union Realty Company. It will be noticed that paragraph 4 of the bill avers that Coyle, Ewing and the realty company approached Mrs. Henry and offered to make sale to her of the property specified by Mrs. Black in her option to Coyle or his nominee, and the written receipt showing the sale made by them is signed by the realty company.

We must take the facts as here averred; whatever inferences are reasonable and obvious we must draw. We do not demand of a pleader that he shall express every obvious inference necessarily to be drawn from plain facts. A man with his senses of sight and hearing impaired, who goes in front [251] of a moving railroad train, we infer is negligent; the facts are susceptible of no other reasonable inference. Here Coyle was an

officer transacting business for the realty company; he takes this option from Mrs. Black in his own name, a conveyance to be made to him or his nominee within thirty days. She agrees to pay the company a fee of $10,000—what for? The answer is an obvious inference—for making the sale at the option price. Coyle and Ewing, both officers of the company representing it to be for the optional period the property of the company, by a writing sell to Mrs. Henry. Whose property is it? Clearly, that of the company, for that from the writing is the obvious inevitable inference. Suppose Coyle and Ewing had claimed after the sale to Mrs. Henry the property was theirs as individuals and did not belong to the company, would a court of equity have hesitated one minute on these facts to decide the property was that of the company when Mrs. Henry bought? That the option, although in the name of Coyle, was merely held by him as trustee for his company? Mrs. Black, it appears, refused to execute a deed to Mrs. Henry when the latter formally tendered performance of all the stipulations of the option; she did, however, in a very few days convey the property to Coyle; on the same day Coyle conveyed it to Mellon, and in addition to the $10,000 commission received from Mrs. Black, received, either for himself or his company, another fee from Mellon.

The facts averred in the bill are sufficient to induce a court of equity to declare Coyle a trustee of the equitable title in favor of the Union Realty Company, and that the rights of that company passed to Mrs. Henry by writing of June 1, 1903. If Mrs. Black still held the legal title, equity would compel her to convey either to Coyle or the realty company, and one or the other of them to convey to the plaintiff. She had, however, conveyed to Coyle; of course he is affected with notice of the fraud attempted to be practiced on plaintiff, and if he still held the title would be ordered to convey to plaintiff. But he conveyed to A. W. Mellon, another of the defendants, who it is averred had full notice of all the transactions and all the conduct of the parties up to and including the sale to plaintiff. If that be so, he holds it subject to the same trust, and the strong arm of a chancellor will reach [252] him as effectively as it could have reached Coyle had he retained the legal title.

The statute of frauds does not protect a fraud of that character. That a corporation which can only conduct its business by and through its officers and employés must show, whenever called upon, a written authority to that officer to do that particular act; and when that officer acting for the company exe-

cutes a written contract by which the corporation is to receive the benefit of the first act performed by its officer before it can be held up to that contract must show a written authority, would be to stretch the inhibition of the statute far beyond anything contemplated by its framer.

Much stress is laid in the argument of defendants' counsel on the entire absence of any writing showing that Coyle was the agent of the Union Realty Company in the transactions. But the business of the company was to take options for the sale of real estate. Coyle was one of its officers and employés employed in conducting its business. When he took the option from Mrs. Black she agreed to allow his company a commission of $10,000 on a sale at the optional price. With Mrs. Black's written option Coyle and Ewing offer the property for sale at Mrs. Black's price to Mrs. Henry; she accepts and the Union Realty Company—not Coyle—sells to her; within a very few days Coyle, in the face of the written contract of his company to sell to Mrs. Henry which he assisted in making, sells the property for an additional fee to himself to Mellon: What, clearly, results from these facts? A trust in Coyle in favor of his company, a palpable trust ex maleficio. It is immaterial that the realty company is not here asserting the trust in this suit. It asserted its title under the right which came to it through Mrs. Black's option, by its written contract of sale to Mrs. Henry. All its rights passed by that sale to her, and she can effectively assert them in spite of the quiescence of the realty company. And if Mellon took his deed from Coyle with notice of Coyle's mala fides, he is but a trustee of the title for the first purchaser, Mrs. Henry.

The learned judge of the court below held, in his opinion on the exceptions, not apparently with much confidence, that this contract was within the statute of frauds. We hold differently. Our first impression on the argument was, that it [253] was only one of those sharp business transactions, which however reprehensible in itself, the moving spirit was cunningly careful to keep within the law so that he might make double fees, but a more careful consideration of the averments of the bill and of the law applicable to them leads us to the conclusion that a much stronger adjective than "sharp" would properly characterize it. Exactly at whose door the fraud lies, or to what extent each must share the consequences of it, we cannot now determine. Our inability to so determine at this stage of the case moves us to only reverse the decree, order the bill to be reinstated, and direct defendants to answer over.

Under the Statute of Frauds a contract to convey real estate must describe the subject matter directly or by reference to something outside the writing, by resorting to which certainty may be attained: Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 77 Am. St. Rep. 46. See, too, Kopp v. Reiter, 146 Ill. 437, 37 Am. St. Rep. 156; Phillips v. Swank, 120 Pa. St. 76, 6 Am. St. Rep. 691; Hamilton v. Harvey, 121 Ill. 469, 2 Am. St. Rep. 118. The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary: Bacon v. Leslie, 50 Kan. 494, 34 Am. St. Rep. 124; Kennedy v. Grambling, 33 S. C. 367, 26 Am. St. Rep. 676.

BOULFROIS v. UNITED TRACTION COMPANY.

[210 Pa. St. 263, 59 Atl. 1007.]

STREET RAILWAY.—To Get on or off a Moving Car, whether propelled by steam or electricity, is negligence per se in him who attempts it. (p. 809.)

STREET RAILWAY—Boarding Moving Car.—If a boy's attempt to board a moving car is not complete when a sudden jerk of the car throws him off, the railway company is not liable for the injuries he suffers; but if he gets safely on, and is jerked off before he has time to be seated, the company is liable. (p. 810.)

Action by Armand Boulfrois for injuries sustained while boarding a moving electric car. He claimed that the speed of the car had been reduced, that he got on it in safety, that he would have reached a seat but for a sudden and violent jerk of the car with which it was started or its speed increased, and that jerk, followed by a second one, threw him off. There was a judgment for the plaintiff, and the defendant appealed.

William A. Challener, Clarence Burleigh and James C. Gray, for the appellant.

R. A. Balph and James Balph, for the appellee.

265 DEAN, J. We desire it to be distinctly understood that in Powelson v. United Traction Co., 204 Pa. St. 474, 54 Atl. 282, Hunterson v. Union Traction Co., 205 Pa. St. 568, 55 Atl. 543, and Bainbridge v. Union Traction Co., 206 Pa. St. 71, 55 Atl. 836, we had no intention of relaxing the well-established rule "that to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it." To this rule, as in all rules, we further said there are some rare exceptions, as in Johnson v. West Chester etc. R. R. Co., 70 Pa. St. 357, and in Pennsylvania R. R. Co. v.

Peters, 116 Pa. St. 206, 9 Atl. 317, and a very few others, which because of their peculiar facts are exceptional. From the whole evidence in this case it did not necessarily and certainly follow that Armand Boulfrois, Jr., the injured person, was either negligent or not negligent. If the car had not stopped when he attempted to get on, and by that attempt he was injured, he was negligent and cannot recover. If it either had or had not stopped and he was safely on, then if the conductor, by suddenly and recklessly turning on the power, gave the car a jerk which threw the boy off, it was the conductor's negligence that caused the injury and he can recover. If the boy's attempt to get on was not complete, if he was still engaged in the attempt when the car was jerked, the inceptional act of negligence when he stepped from the ground onto a moving car still continued and he cannot recover. If he was negligent in getting on, as from his own testimony he was, then when safely on before he had time to get seated, the conductor by suddenly turning on the power jerked him off, it was the conductor's negligence which caused the injury and defendant is answerable.

Was the act of getting on complete when the jerk threw him off, if it did throw him off? If it was complete then the 266 company's negligence caused the accident, just as clearly as if some other passenger on his feet looking for a seat was thrown violently to the floor or thrown off by a sudden jerk of the car by a reckless conductor. The boy's good luck in reaching the running-board in safety did not condone the negligent act of getting on, if he was not yet safely on when thrown off. We have tried to make our meaning plain; if we have failed it is either because our obtuseness of perception or poverty of language fails to make plain to others what is plain to us. The learned counsel for appellee seems to have misapprehended our ruling in the Powelson and other cases cited, for in his argument he uses this language: "We still understand this court to adhere to the well-established rule that whenever the standard of duty shifts, not according to any fixed rule but with the facts and circumstances developed at the trial, the question of negligence cannot be determined by the court but must be submitted to the jury."

That is not the law applicable to this evidence. As applicable to the facts here the law is correctly embodied in defendant's third written prayer for instruction at the trial as follows: "Third. The evidence showing that Armand Boulfrois,

Jr., being upward of fourteen years of age, attempted to board a street-car while in motion, he is prima facie guilty of contributory negligence, and the burden of proof is upon him to establish by the weight of the evidence that he successfully boarded the car, and if the jury find from all the evidence in the case, that the said Armand Boulfrois, Jr., sustained injuries in the attempt to board the car while in motion, by reason of the motion of the car, the verdict of the jury should be in favor of defendant. Answer. Affirmed, with a qualification."

The substance of the qualification appears in the general charge thus: "This point is affirmed unless you find as I have stated, that the motion of the car was such as to induce the plaintiff to believe that it was about to stop, or at least the motion was such that he or any reasonable person would be induced to believe that he could get on with safety." The court then went on and elaborated further this qualification, 267 but in no manner detracted from its significance as we have quoted it. It was, in substance, a denial of the point, and in effect adopting as the law the argument of appellees' counsel already quoted that the standard of duty as to one who gets on or off a moving car shifts, not according to any fixed rule, but with the facts and circumstances. To this we say that as to one who gets on or off a moving car and is injured by so doing the standard does not shift; he is negligent per se. But if he escaped injury by that act of his own, yet subsequently—no matter how short the time—from his own first act, by the distinct act of negligence on the part of the conductor he was injured, he can recover. The evidence showed without question that plaintiff attempted to get on a moving car. Can it be reasonably said, in view of all the testimony, that he was safely on when he was jerked off by the act of the conductor?

It was error to affirm with a qualification which neutralized it appellant's third point. This is the only error requiring notice. The judgment is reversed and a venire facias de novo is awarded.

MESTREZAT, J., Dissenting. For the reasons stated in the dissenting opinion in Hunterson v. Union Traction Co., 205 Pa. St. 568, 55 Atl. 543, I cannot concur with the majority of the court in holding "that to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it," and, therefore, I dissent from the judgment reversing the court below.

That Every Attempt to Board a Moving Train is not, per se, contributory negligence, see Chicago etc. R. R. Co. v. Gore, 202 Ill. 188, 95 Am. St. Rep. 224, and cases cited in the cross-reference note thereto. As to whether it is negligence for a street railway company to start a car before a passenger has taken his seat, see Sharp v. New Orleans City R. R. Co., 111 La. 395, 100 Am. St. Rep. 488.

MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY v. JUTTE.

[210 Pa. St. 288, 59 Atl. 1088, 1119.]

RESTRAINT OF TRADE—Coal Mining and Shipping.—A contract by which the owner of coal lands, coal mines and coal boats sells them and agrees not to engage "in the business of mining, marketing, or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries for the period of ten years," is not in violation of the public policy of Pennsylvania, notwithstanding the purchaser has similar contracts with a large number, but not all, of the coal operators and shippers in the Monongahela valley in Pennsylvania. (pp. 817, 818.)

MONOPOLY — Interstate Commerce — Divisible Contract.—A contract by which the owner of coal lands, coal mines and coal boats sells them and agrees not to engage "in the business of mining, marketing or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries" for ten years is, so far as it affects business carried on beyond the boundaries of Pennsylvania, in violation of the anti-trust or Sherman act; but if the contract is divisible, and valid so far as concerns the coal business in Pennsylvania, the seller may be enjoined from engaging in such business along the Monongahela in Pennsylvania for the period specified. (p. 822.)

Bill for an injunction to restrain the defendant from carrying on the business of mining and shipping coal contrary to an agreement not to do so, made with the plaintiff company on his sale of his mining and shipping business to the plaintiff company.

William B. Rogers, Henry A. Davis and J. R. McCreery, for the appellants.

George C. Wilson and Charles G. McIlvain, for the appellee.

297 DEAN, J. In the year 1899 Finley and Whitney commenced taking options in writing from owners and operators of coal properties on or adjacent to the Monongahela river. The river was navigable for coal shipping about eighty miles southwest from its junction with the Alleghany river at Pittsburg, and for the greater part of this distance is in Pennsyl-

vania. At the time the options were being taken a large number of persons, partnerships and companies, were engaged in the business of mining and shipping coal down the river from the Monongahela territory to points on the Monongahela, Ohio and Mississippi rivers as far south as New Orleans, reaching points in all the states through which the rivers flowed. The object of the promoters was to take options from all the coal operators on the Monongahela from whom they could buy at a price to be agreed upon. Out of the whole number of operators, they agreed with and took an optional purchase from many of them, among these last this defendant and his partners in the coal business. The purchase from defendant and his partners included all the property of the latter then operated by them on the Monongahela river—coal mines, coal boats, towboats, steamers, shipping and landing wharves from Pittsburg to New Orleans. Finley and Whitney also took like options from all the coal operators with whom they could agree, and who were engaged in a like business to Jutte and his partners. It was not a conspiracy or combination between all of the selling companies who, along with defendant, gave options on their properties to plaintiff to purchase and then contracted not to enter into competition with plaintiff on that river for a fixed period, for, so far as appears, each vendor contracted for himself alone, without reference to any other; but as concerned results the consequences to interstate commerce were the same as if all the vendors had joined in one contract with plaintiff. To that extent traffic was stopped on their part the same as if a direct combination among them all had been made. A large number of mines, going operations on the Monongahela, they did not buy or obtain options for. There was also a large number of steamboats and other transportation property on which options were not taken.

On October 2, 1899, in pursuance of the optional agreements [298] with defendant and his partners, for the consideration of over one million dollars, which was paid, all the property was transferred to plaintiff. The other operators who had given options but had no connection with the defendant, about the same time transferred their properties to plaintiff. The plaintiff company was at the time of the transfer, and still is, a Pennsylvania corporation. Within fifteen months after this transfer by Jutte, and after he had received the consideration money, he joined with others and obtained from the state of New Jersey a charter for a coal company, purchased and

opened large tracts of coal land upon the Monongahela, also boats for transportation, and is now actively engaged in the business of mining and transporting coal upon the Monongahela, Ohio and Mississippi.

There is no dispute as to the main facts; so far as a man can bind himself by a written stipulation not to do a particular thing, the defendant, after receiving the full consideration for his promise, is openly and defiantly violating it. He justifies this violation on two grounds: 1. The contract with the others entered into between him and plaintiff constituted a monopoly, and is therefore void because against public policy; 2. The contract is in violation of the act of Congress of July 2, 1890, commonly known as the anti-trust or Sherman act, and is therefore void.

Each of the transfers directly to the plaintiff company embodies this stipulation: "We severally and jointly stipulate, covenant and agree to and with the said the Monongahela River Consolidated Coal and Coke Company not to engage directly or indirectly, individually or through partnership or partnerships, limited partnerships, corporations (except in conjunction with the said the Monongahela River Consolidated Coal and Coke Company) in the business of mining, marketing or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries for the period of ten (10) years from the date hereof."

It may be argued as is argued here—that it was the intention of these contracting parties to create a monopoly in the plaintiff of the coal mining business adjacent to the Monongahela river, but that is an inference from the circumstances dehors 200 the agreement. So far as appears from the face of the agreement, except as to the restriction of defendant to time and place, it was simply a purchase at full price by one coal producer of another's plant. To monopolize, according to the Century Dictionary, is "to obtain or engross the whole of: obtain exclusive possession of." Assume that the plaintiff bought in addition to defendant's plant forty-nine others, and that it had a capital of forty million dollars in stock and bonds: then at the rate it paid for this property it could not have been far from the end of its resources. The evidence shows without contradiction that there were eighteen mines in operation which the plaintiff did not buy, besides there were many thousands of acres of workable coal land accessible to the river which could have been bought had it desired to obtain or engross the

whole. The defendant himself within a few months bought other coal lands and opened mines on the Monongahela. He has also purchased and built boats and acquired all the means of transportation to successfully compete with plaintiff company. Whatever may have been the undisclosed intention of plaintiff at the date of its purchase, neither the agreement it made with the defendant nor those it made with his covendors, nor any of the surrounding facts at the date of the agreement—unless it be the restriction before quoted—show any intention to obtain exclusive possession of either all coal or means of transportation in the Monongahela valley.

That stipulation does undoubtedly exclude the defendant and all others signing similar agreements from mining coal on the Monongahela, or shipping on that river, the Ohio and Mississippi or their tributaries, and to that extent the stipulation constitutes a monopoly—that is, a monopoly in so far as it debars those particular individuals for a specified term of years from engaging in that particular business on certain rivers. Is that stipulation void because contrary to public policy? As we understand the public policy of this commonwealth, both as disclosed in the constitution of 1874 and as apparent in all the legislation since, it is to encourage and promote large aggregations of corporate capital for the development of all the commonwealth's resources.

The last case in this state distinctly following the older rulings is Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159. 300 That case held to the principle that all restraints on trade are injurious to the public, and, therefore, presumably illegal and void on the ground of public policy. In that case five coal companies had entered into an agreement to mine coal and then practically pool the product, each through a committee to equalize their respective shares in the fund according to the award of the committee, which committee was to determine and control the output of the mines so as not to lower the market price of coal. A draft drawn by one of the coal companies on the other to equalize the division between them, after acceptance, was protested for nonpayment. Suit was brought and the defense was made that being based on the pooling agreement, that agreement was in restraint of trade and was void because against public policy. This court so decided and the plaintiff was not permitted to recover. That case was decided in 1871. While we have no doubt as to the soundness of the general principle laid down in that case, we doubt if to-

day the court would hold on the particular facts developed, that the principle was applicable to those facts.

We think that perhaps at this day we would go further, and inquire whether in view of the purpose of the contract and the slight restraint it imposed on trade, it was unreasonable and therefore void, and not void solely because it to a certain extent monopolized the production of coal. For in a certain sense every coal corporation with a large capital engrosses the business to the exclusion of individuals of small means. It is able to buy and develop a large acreage and open upon it many coal mines; then to supply itself at a heavy outlay with all the means of transportation to market. It buys up the stock of smaller corporations and the property of individuals and consolidates them in some form into one company under one management. Probably, at this day, if the five companies in the case cited desired to stop competition among themselves and cheapen production by cheapening the cost of management, they would, under our corporation act of 1874 and its supplements, adopt some scheme of consolidation under one charter and thus to a greater extent and far more effectually suppress competition than they did under their pooling agreement which was declared illegal because against public policy. The professed purpose in organizing these large corporations is not to 301 kill competition, but to cheapen production in the interest of the public. Yet whatever the real purpose competition is stopped by an entirely lawful method. Prior to the adoption of our present constitution, to obtain authority to organize a coal corporation it was necessary in each instance to resort to the legislature for a special act. Compared with the number now in existence of such corporations but few were organized. But the present constitution prohibited all such special acts, and declared, in effect, that in the future all such corporations should be organized under the general laws to be adopted by the legislature. The legislature enacted the general corporation act of 1874—a most liberal act in its requirements. Very soon a host of coal corporations sprang into existence, which with their large capital bought out, or by their cheaper production drove out, individual producers, so that to-day there is but little competition in the business with individuals. We have only to peruse our own constitution and the statutes adopted in pursuance of its mandate to learn what has been the public policy in this regard in the commonwealth. If competition has been largely suppressed, if the courts more liber-

ally interpret in their application the common-law rules on the subject of monopoly, it is only because a more rigorous interpretation would defeat the true intent and meaning of our constitutional and statutory legislation on the subject. Our decisions on this subject may not be in accord with those in some other states, and possibly not in accord with those in the federal courts, but in so far as they affect matters only within the territorial jurisdiction of this commonwealth and do not conflict with the constitution of the United States or statutes adopted in pursuance thereof, we believe they are sound, because in accord with the public policy of this state, and we shall adhere to them.

The opinion in the case cited is a very able one by the late Chief Justice Agnew, in which most of the English authorities and those of our own states up to that day—1871—are noticed. But since then both in England and this country the doctrine has been much relaxed as to all such contracts. A full review of the cases is found in Carter v. Alling, 43 Fed. 208, decided in 1890. In that case Blodgett, J., says: "The only defense seriously insisted upon in the case is that [302] this contract is void as a contract in restraint of trade. . . . . In the earlier English doctrine upon the subject of contracts it was held that they were contrary to public policy, and void; but as the later cases came before the court, this doctrine was much relaxed, and the first modification of the doctrine was the recognition of the validity of contracts of this nature where the restraint was limited as to space or time and reasonable in its nature. And the reported cases are abundant in which an undertaking by one person not to carry on a given business within a limited area and within a fixed period of time has been sustained. . . . . In later years a further relaxation of the old rule has grown up in England and America, and the courts have repeatedly recognized the validity of contracts in the restraint of trade throughout the entire country, where such restraint was not unreasonable in view of the nature and extent of the business of the covenantee."

This is the general current of decision in this day. When a contract is presented which in some degree restrains trade, we do not at once decide that it is void as against public policy, but we go further and inquire, Is it limited as to space or time, and is it reasonable in its nature? We are approaching nearer and nearer to the conclusion, although we have not yet reached it, that common honesty is the true public policy.

This contract is limited as to time—ten years. It is limited as to space—the immediate territory adjacent to three navigable rivers and their tributaries. This is its plain interpretation, although these words are not used; the boats purchased could reach no further than the landings and wharves thereon. Then, is the restriction reasonable? The time was not an indefinite period as in some of the cases; shipments could be made owing to the uncertainty of navigation but once or twice a year. The time and space covered by the restriction were each, considering the character and extent of the business, reasonable. The defendant also sold his goodwill in the business. Considering the facts and that a full price was paid, even though the agreement restrained defendant, we think the restraint reasonable, and therefore the contract was not a violation of the public policy of this state, and hence as concerns that point it ought to be enforced in equity.

The next question is, Is it prohibited by the act of Congress 303 of July 2, 1890 (U. S. Comp. Stats. 1901, p. 3200), known as the anti-trust or Sherman act? That act is entitled, "An act to protect trade and commerce against unlawful restraints and monopolies." The first section of the act declares that "Every contract, combination in the form of trusts or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared illegal."

The leading facts in the Northern Securities case (193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. ed. 679), as stated by Justice Harlan, who rendered the majority opinion of the court, are very briefly these: The Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their systems under a common control, purchased the capital stock of the Chicago, Burlington and Quincy Railway Company and exchanged therefor the joint bonds of the two purchasing roads, thus became the owners of one hundred and seven million dollars of the one hundred and twelve million dollars of the whole capital stock of the purchased road, whose lines aggregated about eight thousand miles, main line and branches, and which after running through several states connected at the western end with the Northern Pacific, one of the purchasing roads. By this operation the purchasing roads obtained full control of the purchased road with its main line and branches. Then Hill and Morgan, holders of stock respectively in the two purchasing companies, with associate stockholders in each company respectively, entered into a combination to form under

the laws of New Jersey a holding corporation to be called the Northern Securities Company, with a capital stock of four hundred million dollars. To this company in exchange for its capital stock was to be turned over the capital stock, or a controlling interest in it, of each of the railways forming the combination, with power in the holding company to vote such stock and in all respects to act as the owner thereof. This, practically, would enable the holding company to pursue a policy which would benefit all the constituent companies at the expense of the public, take away all inducement to competition between them, and be a virtual monopoly of interstate and foreign commerce theretofore carried on by competitors. The organization was completed according to the terms proposed in the original combination. It was declared illegal by the supreme court of the United States. Justice Harlan, speaking for the court, [304] says: "In our judgment the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, and forbids attempts to monopolize such commerce or any part of it."

The facts and the inferences from them in that case, popularly known as the Northern Securities Company case, are distinctly different from those in the case before us. As Justice Harlan says in the course of the opinion: "Necessarily also the constituent companies ceased under such a combination to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation by the name of a holding corporation, the principal, if not the sole object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease." The New Jersey charter of the holding company does not disclose—at least only very vaguely—the real purpose of the combination, but the case of the United States was supplemented by depositions, which left no doubt of its purpose; that purpose was, by agreement, to stifle all competition in freight and passenger business between what had theretofore been competing railroads engaged in interstate commerce, a commerce which had been conducted by rail, which could be conducted nowhere else than on the narrow way owned and under the complete control of the holding company. This, in the very words of the first section of the anti-trust act, was a "com-

bination or conspiracy in restraint of trade" between the states. It placed the entire control of the charges for interstate commerce on these railroads in the holding company, a New Jersey corporation, which could exercise its despotic control solely in the interest of its stockholders regardless of the interests of the people. But those are not the facts with reference to this plaintiff corporation. It carried nothing across the continent on a railroad of which it was in absolute control. Its traffic was on a natural highway of which it had no control whatever, either as to rates or facilities for shipment. The contract between defendant and the other persons from whom plaintiff purchased was between them alone. Except in so far as the contract bound [305] defendant to withdraw from a limited market for a limited period, the public was in no way affected by that contract. Everybody was as free to navigate the three rivers and their tributaries as before. No one could place a contract obstruction in them, for they are navigable waters of the United States, as uncontrollable by artificial means as the tides of the sea.

But notwithstanding this freedom of the highway, does the contract constitute a combination or conspiracy under the anti-trust act in restraint of trade or commerce? The United States enforces no public policy as a state policy, except so far as established by the United States constitution and the laws made in pursuance thereof. The opinion of Justice Harlan, already noticed, after citing the authoritative interpretations of the anti-trust act by that court, asks this question: "Do former adjudications determine the controlling questions raised by the pleadings and proofs [in the case before him]?" To this he answers: "Although the act of Congress known as the anti-trust act has no reference to the mere manufacture and production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or foreign nations; that the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce."

Although Justice Brewer, while concurring in the judgment, did not concur in all the reasons therefor, and particularly

the last clause of the preceding sentence of Justice Harlan, in which it is declared that the act of Congress includes all direct restraints upon commerce without considering their reasonableness. As to that question he says: "Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been, that the contracts there presented [the Northern Securities case] were unreasonable restraints of interstate trade and as such within the scope of the act." While, if the decision had been based on the unreasonableness of the Northern Securities 306 contract, this would have been a decision by a minority of the court, yet Justice Brewer, while not concurring in that reason, does concur in the announcement of Justice Harlan, that the contract in that case operated as a direct restraint upon interstate commerce. It is, therefore, the law, not only the statute itself but its interpretation by the highest federal court. In fact, that interpretation is not new; it only follows many older ones, not all on the same statute, of course, for it was only passed in 1890, but on the power of Congress to legislate on subjects, where that power has been expressly conferred upon it by the constitution of the United States.

We are of opinion that this contract is in direct restraint of interstate commerce, not only under the Northern Securities decision already cited, but under other decisions of the same court cited in the opinion in that case, not that we think, in view of the purpose of this contract and the limited territory and time covered by it, the restriction is unreasonable, but because the United States statute as interpreted by the United States court so declares. If it were a Pennsylvania statute, reaching only Pennsylvania territory, then under common-law rules of interpretation we would decide differently, but the restriction in this contract reaches into and restricts traffic in many states. It is no answer to say that the restriction as to time is short and as to territory comparatively very limited. That the necessity of some protection to the purchaser is so manifest in view of the large price paid defendant, that at least, as to him, it is not unreasonable. These considerations have little or no weight with us when we are called upon to interpret a contract the stipulations of which clash with an act of Congress regulating interstate commerce. In such case we must follow the United States courts. This, however, does not take away our jurisdiction over contracts made in Pennsylvania so far as they effect only Pennsylvania territory. Justice Jack-

son, then a circuit judge, afterward justice of the supreme court of the United States, in re Greene, 52 Fed. 104, uses this language: "But Congress has not the power or authority under the commerce clause or any other provision of the constitution to limit and restrict the right of corporations created by the states or the citizens of the states in the acquisition, control and disposition of property." The learned judge of the court below [307] recognizing this as the law, and that this contract by its terms reached beyond the boundaries of this state, nevertheless held that the contract was divisible, and that part of it which stipulated that defendant would not mine, market or ship coal on the Monongahela, being divisible from that part which restricted him from carrying on interstate traffic, the contract so far as confined to this state should be enforced. This is the latter part of the third conclusion of law: "It remains to consider whether or not the contract not to mine, market or ship coal on the Monongahela river is reasonable. The expression 'mining coal in the Monongahela,' we take to mean mining the coal adjacent to that river, which might be conveyed to and shipped upon the river within the limits above mentioned. The defendant was engaged at the time of selling out the business and goodwill of the companies with which he was connected in mining generally in the Monongahela river district, which, as above stated, is a small and fairly well-defined district. We see nothing unreasonable in an agreement connected with the sale of the goodwill of the mining business in that district to remain out of the business of mining and shipping coal in such a district, although there were parts of the district in which the defendant did not actually operate mines or ship coal."

This conclusion only bears directly on the reasonableness of the restriction, at the same time the limited territory in which it may be enforced is designated; but in the second conclusion of law the court says: "It is contended, however, by the defendant that the stipulation is divisible, and that even if it is void as applied to the largest extent of territory described, it is not invalid as to parts of it. There is no question that such contracts are divisible, and that one part or stipulation thereof may be void while the other is not: Oregon Steam Nav. Co. v. Winsor, 87 U. S. (20 Wall.) 74, 22 L. ed. 315. It seems to us that the contract in question may be fairly said to speak of six different districts, viz., each of the rivers, Monongahela, Ohio and Mississippi, and the district included by each of them and its tributaries; and if any of the districts so designated shall

appear to be not more than is reasonable for the protection of the purchase of the defendant's goodwill, the contract as to it would be valid."

[308] We consider these two conclusions together for they are somewhat independent. Both are earnestly attacked as error by appellant's counsel. It is argued "that while a trade restriction may be reformed by striking out of it such part as is unreasonable, the general rule applies that the reason for the severance must appear in the agreement itself, so that a new contract be not made for the parties." It is argued that the court itself must on a mere inspection of the agreement be able to separate the good from the bad. This, as the court below demonstrates, is not an exact statement of the rule nor the correct rule as held in Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251, and 1 Parsons on Contracts, 457: "Where one gives a good consideration and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal unless the two cannot be separated." The defendant, in consideration of the purchase money, covenanted not to engage directly or indirectly in the business of mining, marketing or shipping coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries for the period of ten years. The anti-trust act does not apply to manufacturing, mining or other productive industries: United States v. Knight Co., 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. ed. 325; United States v. Freight Assn., 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007; United States v. Joint Traffic Assn., 171 U. S. 505, 19 Sup. Ct. Rep. 25, 43 L. ed. 259. Hence, of itself the mining and shipping of coal as a mere productive industry, no matter how large may be the capital of the producing corporation, how many smaller operators or corporations it may have absorbed, as long as it does not directly repress competition, is not obnoxious to the anti-trust act. This contract so far as it restrained defendant from mining and shipping coal in Pennsylvania is good; so far as it tended to restrain him from carrying on interstate commerce, it is bad and cannot be enforced. We have found no authority, nor has appellant pointed us to one, which holds that if a contract be illegal and not on its face severable the whole contract is void. We think the true rule to be, that if any part of an illegal consideration be not divisible, the contract falls. Here the consideration for defendant's [309] promise was one million dollars; his covenant was not to mine and ship on these rivers. The

law steps in and severs the contract by declaring it is unlawful as concerns two of those rivers, but lawful as to the third. Why is not this a severance of the good part from the bad as much so as if he had specified that for a distinct part of the consideration he covenanted not to mine and ship on the Monongahela in Pennsylvania, and for another and distinct part of the consideration he covenanted not to mine and ship on the Ohio and Mississippi? And this divisibility of the contract was as clear the day it was executed as to-day, for that part agreeing not to ship on the Ohio and Mississippi was unlawful then and that part agreeing not to mine and ship on the Monongahela was good then. The defendant knew, or ought to have known when he accepted the consideration, that part of his covenant was worthless and part good.

The Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. Rep. 96, 44 L. ed. 136, a case cited here by both parties, suggests such severance by judicial decree, though that was not the point decided. The defendants, six in number, entered into a combination by which there was to be no competition between them in thirty-six states and territories in the sale of cast-iron pipe. The combination was declared illegal under the interstate commerce act, and all of defendants were enjoined by the court below. The contract was not on its face severable. Justice Peckham, who rendered the opinion affirming the judgment, said: "In one aspect, however, that judgment [of the court below] is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that interstate or international only. This was probably an inadvertence, merely. Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it had none over that wholly within the state, and therefore none over combinations and agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination wholly within the state by reason of the fact that the agreement covers and relates to commerce which is interstate. . . . . The combination herein described [310] covers both commerce which is wholly within a state and also that which is interstate. In regard to such of these defendants as might reside and carry on business in the same state, where the pipe provided for in any particular contract was to be delivered. . . . . The statute would not be applicable to them. . . . . To the

extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own states, it is modified and limited to that portion of the combination or agreement which is interstate in its character." We cite these remarks of Justice Peckham only as showing that an agreement, which on its face bound all, yet as to some was bad under the interstate commerce law. Because they only carried out the combination between themselves, residents of the same state, the court severed them in framing its decree from their colleagues in the agreement who had violated the law. The able counsel for appellant has advanced no convincing reason in his argument why the court below should be convicted of error in treating part of this contract as lawful and part as unlawful as it clearly is.

We discover nothing in the specifications of error which warrants further discussion; they are all overruled and the decree is affirmed.

Unlawful Trusts and Monopolies are discussed in the monographic note to Harding v. American Glucose Co., 74 Am. St. Rep. 235-273; and in the recent cases of Slaughter v. Thacker Coal etc. Co., 55 W. Va. 642, 104 Am. St. Rep. 1013, and cases cited in the cross-reference note thereto.

Contracts in Restraint of Trade are valid if the restraint is such only as affords a fair protection to the interests of the person in whose favor they are given, and not so large as to interfere with the interests of the public: Swigert v. Tilden, 121 Iowa, 650, 100 Am. St. Rep. 374, and cases cited in the cross-reference note thereto. It is held in Keene Syndicate, 69 Kan. 284, ante, p. 164, that where an electric corporation leases its property to a rival corporation, and agrees not to furnish light and power in the city for ten years, the lease is in contravention of public policy.

RUSS v. COMMONWEALTH.

[210 Pa. St. 544, 60 Atl. 169.]

STATUTORY CONSTRUCTION—Appropriation of Money.—If both Houses of the legislature resolve to attend in a body the dedication of a certain monument, and that "all matters pertaining to such attendance be referred to the committee of military affairs of the Senate and House," such committee has authority to contract for edibles, liquors and cigars for the members of the legislature while attending the dedicatory exercises. (pp. 827, 828.)

STATUTORY CONSTRUCTION.—If Divers Statutes Relate to the Same Thing, all should be taken into consideration in construing any one of them; all acts in pari materia are to be taken together as if they were one law. (pp. 828, 829.)

CONSTITUTIONAL LAW.—The Test of Legislative Power is constitutional restriction; what the people have not said in the organic law their representatives shall not do, they may do. (pp. 829, 830.)

CONSTITUTIONAL LAW—Appropriation for Entertainment of Legislature.—The constitution of Pennsylvania does not prohibit the legislature from attending in a body the dedication of a monument to a distinguished citizen, and providing that the expense of the legislators for edibles, liquors, cigars, etc., during the attendance at the dedicatory exercises, shall be paid from the public funds. (p. 834.)

Assumpsit for five thousand nine hundred and eleven dollars and sixteen cents, with interest, on a book account for "table supplies, wines, liquors, car fare, services, etc.," furnished the members of the legislature of Pennsylvania during their excursion to New York City to attend the Grant monument dedication ceremonies. The claim was based on a contract made by the committee of military affairs of the legislature. The court entered a compulsory nonsuit, and subsequently refused to take it off.

M. W. Jacobs and John E. Fox, for the appellant.

C. H. Bergner, Hampton L. Carson, attorney general, and Frederic W. Fleitz, deputy attorney general, for the appellee.

[550] BROWN, J. Want of authority from the state to the committees of military affairs of the Senate and House to enter into a contract with the plaintiff was the reason given for the entry of the nonsuit and the refusal to take it off. If there was such authority, it is to be found in the following preamble and resolution [551] passed over the veto of the governor: "Whereas, the dedication of a monument erected in memory of the late General U. S. Grant, in New York, occurs on April 27th, and is a matter of national importance, which the commonwealth of Pennsylvania should suitably recognize as commemorating the life and deeds of a hero, whose memory we revere; therefore be it resolved (if the House concur), that the members of the Senate and House of Representatives attend such dedication in a body, and that all matters pertaining to such attendance be referred to the committee of military affairs of the Senate and House."

In the preamble there is not only a recognition by the people of the state, through their representatives, of the national importance of the dedication of the monument to a great soldier, but an avowal of the commonwealth's duty to suitably recognize the event. This was laudable, because it was patriotic.

By the resolution action was taken, committing the state to participation in the dedicatory exercises. It was sent to the governor for his approval, because it must have been regarded by those who passed it as committing the state to it, and, if so, it was a matter in the nature of legislation. It is only such resolutions that require executive approval under section 26 of article 3 of the constitution: Commonwealth v. Griest, 196 Pa. St. 396, 46 Atl. 505, 50 L. R. A. 568. If both Houses had simply resolved to attend the exercises in a body, and to adjourn for a day for that purpose, it would have been no concern of the governor, and they could have gone with or without his approval; but if more was embodied in the resolution, amounting practically to an enactment authorizing special committees of the Senate and House to act on behalf of the state in making suitable the recognition which both branches of the legislature had agreed upon, it was for the governor to approve or disapprove.

But the contention of the learned counsel for the commonwealth is that, even if the resolution does involve legislation, no authority to act was conferred upon the committees by the words "all matters pertaining to such attendance be referred to the committee of military affairs of the Senate and House," their duty being simply to consider and report to the respective Houses. This cannot be regarded as the reasonable meaning of the words. While there is no express authority given to 552 the committees to do any particular thing, there is, on the other hand, no direction to them to report, and that they were to act, and not simply report what further action each House should take, seems to be manifest. The resolution was first introduced in the Senate. Why should it ask for a report from the committee of military affairs of the House as to what it should do, and why should the House, subsequently concurring in the resolution to attend the dedication in a body, ask for a report from the Senate's committee? Both bodies had resolved to go, and referred all matters in connection with their going to a joint committee composed of the appropriate committee of each. The intention of the legislature is to be gathered not from the strained, but from the natural, meaning of the reference to the committee of all matters relating to the attendance. "All matters pertaining to such attendance" certainly included arrangements for the transportation and entertainment of the members of the legislature, and if these were referred to the committees, the common understanding would be that they

were to make them. If so, the power had necessarily been conferred on the committees of contracting for such arrangements. They so understood the resolution; the plaintiff, who dealt with them had the same understanding of it; and the members themselves intended that it should be so understood, for, without calling for or receiving any report from the committees, they accepted the arrangements that had been made for them. The failure of the learned court below to so interpret it must be regarded as error. We consider this clear, with nothing before us except the resolution itself; but subsequent legislation, while not purporting to be expository of it, unmistakably indicates the legislative understanding of what was intended by it. By an act passed at the same session, though vetoed by the governor because regarded as an improper expenditure of the public funds, an appropriation was made for the payment of the expenses incurred by the legislature "in attending the ceremonies connected with the unveiling of the monument at the tomb of General U. S. Grant." From the testimony, it appears that the only expenses incurred were for the entertainment furnished by the plaintiff and for badges supplied by J. H. Shaw. By the act of May 15, 1903 Public Laws, 406, the sum of four hundred and twenty-one dollars was appropriated [553] in payment of the badges furnished by Shaw. These acts were passed by the legislature with section 11 of article 3 of the constitution before it, providing that no bill shall be passed "for the payment of any claim against the commonwealth without previous authority of law." The authority of law here was the reference by the legislature of all matters pertaining to the attendance to the committees of military affairs of the Senate and House. The resolution and acts of 1897 and 1903 related to the same subject matter, and are to be considered together in determining the legislative intention. "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them and it is an established rule of law that all acts in pari materia are to be taken together as if they were one law: Doug. 30; 2 Term Rep. 387, 586; 4 Maule & S. 210. If a thing contained in a subsequent statute be within the reason of the former statute, it shall be taken to be within the meaning of that statute: Ld. Raym. 1028; and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its

meaning, and will govern the construction of the first statute: Morris v. Mellin, 6 Barn. & C. 454; 7 Barn. & C. 99. Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words: Wimbish v. Tailbois, Plow. 57. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter: Stowell v. Zouch, Plow. 356. The citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason": United States v. Freeman, 3 How. 556, 11 L. ed. 724.

A second question raised by the appellee is as to the power of the legislature to authorize the committees to make such a 554 contract as the one on which the plaintiff sues. The test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do. It is hardly needful that authorities be cited and multiplied in support of this, but, as they seem to be unheeded whenever legislation is not in accord with the sense of right, propriety and views of those affected by it, there is nothing for us to do except to keep on repeating, even at great length, what has been said, in the hope that ultimately legislative power may be better understood.

"The constitution allows to the legislature every power which it does not positively prohibit": Norris v. Clymer, 2 Pa. St. 277. "To me, it is as plain that the general assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the federal constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every casus omissus, and to interpolate into it whatever in our opinion ought to have been put there by its framers.

The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely. The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be [555] made so perfect that its rulers will always hold it to be the true course. In the very best a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the legislature, and relied, for the faithful execution of them, on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do, if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice": Black, C. J., in Sharpless v. Mayor of Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759. "However easy it may be to demonstrate that public debts ought not to be created for the benefit of private corporations, and that such a system of making improvements is impolitic, dangerous and contrary to the principles of a sound public morality, we can find nothing in the constitution on which we can rest our consciences in saying that it is forbidden by that instrument": Moers v. City of Reading, 21 Pa. St. 188. "Nothing but a clear violation of the constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void": Pennsylvania R. R. Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360. "To justify a court in pronouncing an act of the legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the con-

stitutionality of the act. This rule of construction is so well settled by authority that it is entirely unnecessary to cite the cases": Commonwealth v. Butler, 99 Pa. St. 535. "In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete authority as it vests in and may be exercised by the sovereign power of any state, subject only to such restrictions as they have seen fit to impose, and to the limitations which are contained in the constitution of the United States. The legislative department is not made a [556] special agency for the exercise of specially defined legislative powers, but is intrusted with the general authority to make laws at discretion": Powell v. Commonwealth, 114 Pa. St. 265, 60 Am. Rep. 350, 7 Atl. 913. "But whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. This latter body represents their will just as completely as a constitutional convention in all matters left open by the written constitution. Certain grants of power, very specifically set forth, were made by the states to the United States, and these cannot be revoked or disregarded by state legislation. Then come the specific restraints imposed by our own constitution upon our own legislature; these must be respected; but in that wide domain not included in either of these boundaries the right of the people through the legislature to enact such laws as they choose is absolute. Of the use the people may make of this unrestrained power, it is not the business of the courts to iequire. We peruse the expression of their will in the statute; then examine the constitution and ascertain if this instrument says, 'thou shalt not,' and if we find no inhibition, then the statute is the law simply because it is the will of the people, and not because it is wise or unwise": Commonwealth v. Reeder, 171 Pa. St. 505, 33 Atl. 67, 33 L. R. A. 141. "Prima facie, the legislative authority is absolute except where expressly limited. This is the uniform principle of all political and legal views, and of all constructions recognized by constitutional law": Commonwealth v. Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801, 49 Atl. 351, 53 L. R. A. 837. "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights

are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the [557] constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power. . . . . If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it should be found that these principles are placed beyond legislative encroachment by the constitution": Cooley's Constitutional Limitations, 6th ed. (1890), c. 7, secs. 4, 5, p. 201.

Scanning the list of expressly forbidden legislation, as found in section 7, article 3, of the constitution, there is no restriction upon what was done by the legislature in its action assailed in this proceeding; nor is there any other line in that instrument by which the action is impliedly prohibited, for nowhere is such legislation, or anything relating to it, mentioned. The resolution may be regarded by some as unwise and improper, and if in any legislative district there were those so minded at the time it was adopted, and they happened to be in the majority, they had the opportunity to exhibit their disapproval, if any senator or member who voted for it came up for re-election. It is doubtful, however, if any legislative career would have been cut short for support of the measure. From time out of mind legislative bodies have, at the public expense, and with hearty popular approval, paid fitting tribute to the deserving dead, who, in peace or war, had served the state or nation; and public money so expended is well spent for the public, for it strengthens and elevates patriotism, and helps to make better men and women of the young who witness the homage so paid. But this digression need proceed no further.

We do not understand that if the legislature had named a separate commission to represent the state at the exercises, and had provided for the payment of its expenses, the power to do so would be questioned; but because the two bodies constituted themselves such representatives, the power is questioned, for

the reason that, as the claim of the plaintiff is for food and drink furnished them, they will, if it is allowed, receive compensation in violation of section 8, article 2 of the constitution, which provides that "The members of the general assembly shall receive such salary and mileage for regular and special sess sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise."

Proper entertainment of the legislature was not merely incidental to its attendance at the dedication, but was necessary, and, therefore, formed part of the state's expenses in making suitable recognition of the ceremony. The concurrent resolution contemplated the payment of nothing but such expenses, and their payment to the man who furnished what was so necessary cannot be regarded as compensation or pay to the members of the legislature for their services as legislators in any sense, whether such strained meaning for "compensation" be searched for in dictionary or encyclopedia of law, or the word is to be interpreted as popularly understood.

It is conceded by the learned and able counsel for appellee that the payment of the expenses may not be technically compensation, and yet, by the process of reasoning through which they would have us declare it to be compensation within the constitutional prohibition, the very ink furnished to senators and members, and the pens dipped into it in answering the daily inquiries of constituents, would have to be regarded as constitutionally unlawful compensation to them, if paid for by the state.

The payment of expenses by the state in having itself fittingly represented, when it ought to be represented on great public occasions, involves nothing but the maintenance of its own dignity; and who shall represent it, or how it shall be represented, is for the legislature alone. If in their judgment its members, representing every portion of the state, ought to do so, who can better represent the commonwealth, and when they do so, what legislative service are they rendering for which they are receiving forbidden compensation because the state pays the expenses necessarily incident to its representation? The state is often represented by commissions created by the legislature, composed in part of members of the Senate and House, but no one has ever thought of asking a court to say that those members of such a commission who happen to be senators or representatives receive prohibited compensation because their hotel bills are paid with those of the other mem-

bers of the commission out of the appropriation for the payment of its legitimate expenses. That members of a legislature may 659 be only part of such commission, instead of as one body being the state's sole representative, can make no difference in principle, if the position taken by the appellee is to be sustained. It has not been very elaborately pressed by the learned counsel representing the commonwealth, and we need not discuss it further.

In disposing of the questions raised on this appeal, we have nothing to do with the appellant's claim as presented in the court below; and it would, therefore, be improper for us to say anything about it. If, after it shall have been passed upon by a jury, the plaintiff or defendant should feel aggrieved by the finding, and the court below should not correct any wrong that may be done, the alleged grievance may be the subject of another appeal. All that we now decide is that, by the act authorizing the appellant to sue the commonwealth, he is to recover such sum as under the rules of pleading and evidence may be justly due him. Under these rules the case must be tried, and such sum awarded to him as, under proper instructions from the court and under all the proofs, the jury may find to be just.

Judgment reversed and procedendo awarded.

MESTREZAT and POTTER, JJ., Dissenting. That there may be no doubt as to the claim for which this action was instituted and the items of which the majority of this court says are chargeable against the commonwealth of Pennsylvania, we state the claim in the language of the plaintiff himself, as found in his statement, as follows:

"Legislature of Pennsylvania,
"Excursion to New York City
"General Grant Monument Dedication.
"To James Russ, Dr.

"1887

"April 27,	To table supplies	$1,678 36
	Wines and liquors.....	3,026 60
	Supper at Dooner's for Com.	61 90
	J. H. Riebel, cigars.....	450 00
	Hire of china and breakage	187 53
	Employés' services	240 00

560 "Amount brought forward..... $5,644 39

	Car fare	202 50	
	Purchase of stoves.....	70 00	
	Freight charges	8 75	
	James Russ, incidental expenses	175 00	
			$6,100 64
"Cr.	By liquors returned.....	157 00	
	Sale of stoves	32 00	189 00
			$5,911 64"

The edibles and drink were furnished as a lunch and dinner, both meals being served between the hours of 11:30 A. M. and 6 P. M., on the boat which carried the legislative excursionists on the Hudson river from Jersey City to a point opposite the Grant monument, a distance of ten miles or less, and back. There were four hundred and twenty-five persons, of which number two hundred and fifty-three were members of the legislature. Relative to the meals and liquors furnished, Senator Krause, chairman of the joint committee to make arrangements for the excursion, testifies as follows:

"Q. Tell us what he [Russ] furnished. A. He furnished the lunch; as soon as we arrived at Jersey city and got on the boat there was a very nice lunch prepared for us.

"Q. Go on and state what else Mr. Russ did. A. After the ceremonies were over he furnished an elegant dinner for us, with wines and liquors and everything included, with the cigars; had cigars going on the train, cigars on the boat, and everything in first-class order.

"Q. Do you remember the kind of wine that was furnished? A. White Seal; wasn't any too good for the members of the legislature, we thought.

"Q. Do you remember what else was furnished, can you tell what was furnished in the way of food for the dinner? A. Oh, it was so fine that I forget exactly all the elegancies that we had; we had everything first class.

"Q. Can you tell us what other liquors were furnished? A. Liquors of all description.

"Q. Describe them; tell what they were. A. We had plenty of whisky, and we had plenty of beer and plenty of apollinaris; I don't know how many drank apollinaris, but apollinaris was furnished.

561 "Q. Did you specify what liquors? A. Yes, sir; as far as the wines were concerned, because that was a motion unanimously carried in the committee.

"Q. You did not specify anything with respect to the whisky, beer or cigars? A. Oh, I told him we wanted all those things.

"Q. I understand, generally speaking, Senator, that you ordered nothing special from Mr. Russ except the wine? A. That is all.

"Q. You left it to his discretion? A. That is right."

John Riebel, a cigar manufacturer of Philadelphia, was a member of the military committee of the House as well as of the joint committee to arrange for the excursion. He was called as a witness by the plaintiff and testified that the joint committee, about three-fourths of which were present, held a meeting in Philadelphia the night before the excursion, and that Mr. Dooner served them with a lunch for which a charge is made in the plaintiff's bill. He further testified:

"Q. Can you tell what he [Russ] gave to you as lunch? A. Only a first-class lunch; I can't begin to enumerate what articles he had there, or what food he had there; a first-class lunch in every respect.

"Q. State whether he provided anything else. A. On our return back he had supplied one of the finest dinners a man wanted to sit down to, served on the boat, had all the elegancies of the season, anything you can mention in the eatable line almost."

As to the contract made with him by Senator Krause and what was furnished in pursuance of it, the plaintiff testifies:

"Q. What did he say to you when he came there? A. He told me he wanted a first-class layout, everything up to date, and I did so.

"Q. What did he tell you he wanted as to the number of meals, if anything? A. Well, a lunch the moment we got on the boat and a dinner returning toward New York—Jersey City.

"Q. What did he [Krause] say? A. He said I should go ahead and make all arrangements, and especially the one thing that they [the committee] put out especially was 'White Seal champagne.'

"Q. (Mr. Fox.) Now, can you state what you did furnish? A. Oh, Lord! I furnished everything; they had a nice lunch and very fine dinner.

"Q. Now, about how much a head did you calculate to charge? A. I did not calculate at all, there was no price what-

ever; if it cost five million dollars there was no price at all that was to it.

"Q. In 562 other words, there was no limit put on the cost? A. No, sir; not a cent.

"Q. You don't know the kind of liquors returned? A. No.

"Q. Do you know the price charged for the returned liquors? A. Just that much there; it was very lucky any was returned at all."

The only basis for this claim of five thousand nine hundred and eleven dollars and sixteen cents against the state for table supplies, wines and liquors, cigars and "incidental expenses" (about one-half of the claim, it will be observed, being for wines and liquors) is a joint resolution passed by the Senate and House of Representatives over the veto of the governor in which it is resolved "that the Senate and House of Representatives attend said dedication [of the General Grant monument in New York] in a body, and that all matters pertaining to such attendance be referred to the committee on military affairs of the Senate and House." The learned trial judge held that this resolution conferred no authority on the committee to make a contract with the plaintiff for the items charged in his bill, and hence he had no valid claim aginst the state. For the reasons set forth at length in the opinion refusing to take off the nonsuit, we entirely concur with the conclusion of the court below, and would affirm the judgment.

It does not aid the position of the majority of the court to cite authorities to sustain the proposition, conceded to be the settled rule in all the states of the federal Union, that the power of the general assembly of a state to legislate is absolute, subject only to the restrictions and limitations imposed by the constitution of the state and that of the United States. That principle is not controverted, but it is most strenuously denied that the legislature, by the joint resolution in question, gave authority to the committee on military affairs to bind the state by a contract to pay the plaintiff the claim for which this action was brought. It is apparent that the language of the resolution conferred no direct authority on the committee to enter into a contract to bind the state for any expense incurred by the legislature in attending the dedicatory exercises. If any authority to contract for such purpose is given, it is by implication and that alone, and not being necessarily implied from the power conferred upon the committee by the joint resolution, the court should not sustain it on that ground. The

character of the claim conclusively rebuts any implication that [563] the legislature in passing the resolution intended to authorize the committee to make a contract for it. Such interpretation of the resolution opens the door to raids upon the state treasury by committees of the legislature by which the taxpayers of the state can be made to pay claims which, as in this instance, the general assembly of the commonwealth or no other self-respecting legislative body, would for one instant think of approving. Had the plaintiff's claim, the character of which is shown by the items thereof and the testimony, been presented to the Senate and House in open session at the time the joint resolution was passed, we are satisfied that those bodies would not have authorized the committee to contract for or pay it. It would have shocked the legislative conscience, as well as that of the people of the commonwealth. The testimony leaves no doubt as to the purpose in view when the contract was made and what was expected to be, and what was, furnished in pursuance of it. About seventeen hundred dollars' worth of food and three thousand dollars' worth of wines and liquors were consumed on the steamer by the four hundred and twenty-five guests of the state in six and one-half hours. This tells the brief but comprehensive story of the manner in which the money claimed here was applied (in the language of the preamble to the joint resolution) "in commemoration of the life and deeds of a hero whose memory we revere." Further comment upon the subject is unnecessary. To hold that authority was conferred upon the legislative committee by the concurrent resolution to contract for such a claim is violative of all sound rules of interpretation, and is not supported by reason or authority.

We would, moreover, take a step further than the trial court and hold that the legislature was prohibited by the constitution from authorizing the committee to make the contract under which this claim is made against the state. Article 2 of section 8 of that instrument provides: "The members of the general assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for services upon committee or otherwise. No member of either House shall, during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term." At the time of the excursion to New York, the members [564] of the legislature were receiving as compensation a salary and mileage fixed by law and hence under this constitutional pro-

vision they could receive "no other compensation whatever." Equally explicit and mandatory is the provision that no member shall "receive any increase for salary or mileage under any law passed during the terms" for which he is elected. Mr. Buckalew, a recognized authority upon the interpretation of the constitution, says (Constitution, 40): "Compensation to members is properly for time spent, for services performed and for personal expenses incurred for the public; but the forms of the compensation to be made to them for outlay, time and labor are the two expressly fixed by the constitution, namely, salary and mileage, which are declared to exclude all others." A member of the legislature is therefore confined to his salary and mileage as compensation for his services, in neither of which is the claim here presented included. The joint resolution shows that the members attended the dedication as a legislative body, and the claim for the edibles, liquors, cigars, etc., furnished by the plaintiff is "other compensation" to the members of the legislature than salary and mileage, and therefore is clearly within the constitutional inhibition. If the sum claimed by the plaintiff had been paid by the state to the members to defray their expenses in attending the dedication, it would clearly have been additional to the compensation allowed them by law. The practical effect of a payment by the state direct to the plaintiff is the same as a payment of the amount to the members and by them to the plaintiff. In either case, they receive an additional compensation from the state for their services as members of the legislative body to which they belong.

The Power of the Legislature to make appropriations to celebrate important historical events is recognized in Daggett v. Colgan, 92 Cal. 53, 27 Am. St. Rep. 95.

COHN v. MAY.

[210 Pa. St. 615, 60 Atl. 301.]

NEGLIGENCE—Proximate Cause. A Cause is not too Remote merely because it produces the damages by means of an intermediate agency. Where the injury was the immediate consequence of some peril to which the injured person was obliged to expose himself to avoid the peril arising from the defendant's negligence, it is proximate enough. (p. 842.)

NEGLIGENCE.—The Test of Proximate Cause is whether the facts between the negligent act and the final result constitute a continuous succession of events so linked together that they become a natural whole. (p. 842.)

NEGLIGENCE—Proximate Cause.—If a Lower Tenant in a building negligently obstructs a stairway, so that when a fire occurs the upper tenant cannot escape by the stairway, and is injured while escaping from a window, the obstruction is the proximate cause of the injury. (p. 843.)

Action to recover for personal injuries. The trial court filed an opinion in which it stated the following facts: "Plaintiff was in partnership with his brother. The firm occupied the fifth story of a building on Arch street east of 8th, and manufactured clothing. The defendant occupied the lower stories. A fire occurred in the premises in the evening. The plaintiff attempted to escape by a flight of stairs which ran to the Arch street front, but found his exit cut off by flames. He then tried the back staircase, but found that there was some obstruction preventing his exit. In the darkness he could not tell what it was. He then retreated to the upper story, and tried the outside fire-escape, but the flames were then sweeping across the escape on a lower story. The owner had provided chains and ropes, and the plaintiff slid down one of the ropes. It did not reach below the second story, and when the plaintiff came to the end of the rope he was compelled to drop to the street. He was injured by having the palms of his hands blistered in sliding down the rope, and in his limbs and back by the drop from the end of the rope."

A nonsuit was entered, and error was assigned for a refusal to take it off.

Samuel Englander, for the appellant.

George P. Rich, for the appellee.

617 POTTER, J. In the statement of claim filed by the plaintiff in this case, it was averred that the plaintiff's firm

"rented the fifth floor of the said building of the defendant, who was then and there lessee of the entire premises," and that it was the duty of defendant to accord to the plaintiff ready and convenient ingress and egress from the building by the back stairway, and it was charged that the defendant had negligently violated such duty by blocking up the stairway by placing boxes upon it. Upon the trial it appeared that plaintiff's firm did not rent from defendant, but that both leased from a third party, agent for the owner of the building. Plaintiff moved to amend the statement to accord with the facts, but the court refused to allow the amendment, holding that it would introduce a new cause of action. No exception was taken to the refusal to allow plaintiff to amend.

[618] At the close of the plaintiff's testimony, a compulsory nonsuit was entered, which the court subsequently refused to take off. This refusal is the only question properly raised upon this appeal. It seems that while the trial judge was of opinion that there was a material variance between the allegations and the proof, yet the refusal to take off the nonsuit was based upon the ground that the negligence of the defendant was not the proximate cause of the accident. An examination of the statement shows that the substantial cause of action which it sets forth is that upon which the plaintiff relied at the trial. The statement as to the respective tenancies of the parties was merely explanatory, and might have been omitted. It is clearly set out that the plaintiff's firm were occupants of the fifth floor of the building and the defendant "then and there occupied certain floors of said building below plaintiff"; that defendant, his servants and agents, permitted and caused to be placed upon a certain stairway, leading to and from the fifth floor, divers boxes so that the stairway became choked and blocked with said boxes, and ingress to and egress from the fifth floor by way of said stairway was cut off, and as a result thereof the plaintiff was injured.

This was a direct averment of negligence on the part of the defendant which the evidence produced at the trial tended to prove. We think it was sufficient: See Coates v. Chapman, 195 Pa. St. 109, 45 Atl. 676. In his opinion refusing to take off the nonsuit the trial judge says that under the evidence the jury would have been warranted in finding that the boxes placed by defendant's workmen upon the back stairway constituted the obstruction which prevented the plaintiff from making use of that means of exit. But he does not think this act of negli-

gence can be considered as the proximate cause of the injuries which resulted to plaintiff. In this conclusion we cannot agree. A case much like the present one in some of its facts was Sewell v. Moore, 166 Pa. St. 570, 31 Atl. 370. There the plaintiff was prevented from reaching the fire-escape by the fact that the door leading to it was locked and she then jumped from a window and was injured. The court said (166 Pa. St. 576, 31 Atl. 373): "The difficulty was in the locking of the door that led to the fire-escape on the third floor. The plaintiff got to this in time and had it been open as it should have been she would have [619] escaped injury. . . . . The only proximate and effective cause of the injury was the locking of the door."

A cause is not too remote merely because it produces the damages by means of an intermediate agency. Where the injury was the immediate consequence of some peril to which the injured party was obliged to expose himself in order to avoid the peril arising from the defendant's negligence, it is proximate enough: Pittsburg v. Grier, 22 Pa. St. 54, 6 Am. Dec. 65; Vallo v. United States Exp. Co., 147 Pa. St. 404, 30 Am. St. Rep. 741, 23 Atl. 594, 14 L. R. A. 743.

The cases upon this subject are reviewed in Gudfelder v. Pittsburg etc. Ry. Co., 207 Pa. St. 629, 57 Atl. 70, and the test of proximate cause is again cited as being whether the facts between the negligent act and the final result to the plaintiff constitute a continuous succession of events, so linked together that they become a natural whole.

In the present case, danger from fire was reasonably to be apprehended and guarded against at all times. The stairways, both back and front, formed the natural means of passage to and from the upper stories, and common prudence required that they be kept free from obstructions. When the servants of the defendant blocked up the passageway, they may not have anticipated that a fire would occur so soon, but they were responsible for any resulting damage which might be caused by their careless act. The result might have been a fall upon the stairway by some one seeking to pass. It might have resulted in damage in more than one unforeseen direction. But as it was, it so happened that under the imperative necessity of escaping from the fire, the plaintiff sought to descend the stairway. Had it been unobstructed he could readily have escaped in that way. But he says in his testimony that the boxes which had been placed in the way by the defendant's servants cut him off. Being in extreme peril, and acting upon what

seemed to him the best judgment, he says that the only way of escape he then found open was through a window and down a rope, and then by a drop to the ground. In following this method, he received the injuries for which he here seeks to recover. If the jury believe the testimony of the plaintiff, it presents a succession of events which may properly be considered as unbroken. Certainly if the sequence of events, as they actually did occur, had been suggested beforehand [620] to the mind of a reasonably prudent man, he would have thought it quite possible for them to follow.

Our conclusion in this case is that if the stairs were so obstructed that the plaintiff could not reasonably make use of them, such obstruction may have fairly been held to be the proximate and effective cause of the injury suffered by the plaintiff.

The assignment alleging error in the refusal to take off the nonsuit is sustained.

The judgment is reversed and a procedendo is awarded.

The Doctrine of Proximate Cause is the subject of an extended note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807-861. The proximate cause is that act or omission which immediately causes or fails to prevent the injury: Chattanooga Light etc. Co. v. Hodges, 109 Tenn. 331, 97 Am. St. Rep. 844; Anderson v. Schurke, 121 Iowa, 340, 100 Am. St. Rep. 358. It is not always that which is nearest in time or place to the injury: Snyder v. Philadelphia Co., 54 W. Va. 149, 102 Am. St. Rep. 941. As to the effect of an intervening agency, see Andrews v. Kinsel, 114 Ga. 390, 88 Am. St. Rep. 25; Big Goose etc. Ditch Co. v. Morrow, 8 Wyo. 537, 80 Am. St. Rep. 955; Afflick v. Bates, 21 R. I. 281, 79 Am. St. Rep. 801; and as to the effect of concurring causes, see Knouff v. Logansport, 26 Ind. App. 202, 84 Am. St. Rep. 292; Roach v. Kelly, 194 Pa. St. 24, 75 Am. St. Rep. 685.

POLLACK v. PENNSYLVANIA R. R. CO. (No. 1).

[210 Pa. St. 631, 60 Atl. 311.]

RAILROADS—Causing Child to Jump from Moving Car.—Where a boy climbs upon a box-car as a trespasser, and, while the car is moving at such a speed that it is dangerous for him to get off, he attempts to do so through fear induced by brakemen calling to him to get off and raising a switch club in a threatening manner, the railroad company is answerable for the injuries which he suffers, but not unless the brakemen fail to exercise that prudence and ordinary care which the instincts of humanity and rules of law require in dealing with a child of tender years. (p. 845.)

John Hampton Barnes, for the appellant.

George Demming, for the appellee.

632 ELKIN, J. Joseph Pollack, the plaintiff, a minor, nine years of age, was seriously injured by slipping or falling from a box-car in a freight train belonging to defendant company, under the following circumstances:

The defendant has its tracks laid on Delaware avenue in the city of Philadelphia. On the evening of June 27, 1903, a number of box freight-cars were standing upon defendant's tracks on said avenue. Joseph Pollack, with four other boys, on the afternoon of that day climbed on the top of these cars and was playing on and about them. Just a few moments before the injury to the plaintiff occurred the employés of the defendant company were engaged in coupling the cars, making them up into a freight train. An engine of the defendant moved back toward these cars for the purpose of being connected therewith and hauling the train a short distance away. All of the boys except Joseph saw the engine moving toward the cars and got off without being injured. Joseph did not see the engine until it was coupled to the cars and the train had commenced to move away. The boy at this time, being on top of one of the box-cars, in order to protect himself was holding fast to the brake wheel or beam at the end of the car, waiting, as he testified, for the train to stop so that he could get off in safety. A brakeman who was standing on the ground at the side of the train while it was moving saw the boy and called aloud twice, saying, "Get out of there." At about the same time another brakeman on top of the moving cars, walking toward the place where the boy was clinging to the brake wheel, called aloud, "Get off there." According to the testimony 633 of the plaintiff the brakeman on top of the car had a "switch club" in his hand, "and wanted to fire it at me." The boy then became frightened, and in attempting to climb down the steps of the ladder at the end of the car, slipped and fell on the track, was run over by the train and suffered severe injuries for which he seeks to recover damages in this action.

Although the boy was a trespasser, and might have been ejected from the train in a manner which would not endanger his life or injure his body, yet, the principle announced in Enright v. Pittsburg etc. R. R. Co., 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938, 53 L. R. A. 330, rules this case, and justified the court below in submitting the question to the jury to determine whether under all the circumstances the defendant was guilty of negligence. In that case it was held that a child

of tender years, who while trespassing on a freight train is frightened by the shouts and threatening action of a brakeman while in the discharge of his duties, so that he jumps from the train while it is in rapid motion, and is injured, may recover damages from the railroad company for the injuries sustained.

In the case at bar, the child being of tender years, and in a perilous position, it was the duty of the brakeman to use the care that reasonable and prudent persons would exercise under the circumstances in attempting to cause him to alight from the moving train. The boy was not injured by reason of the dangerous position in which he had placed himself on top of the cars, but because of the negligent act of the brakeman in causing him to get off while the train was in motion. If the brakeman had not frightened the boy by their calls of "get off," and by raising the "switch club" in a threatening manner, the boy would have remained in safety clinging to the brake wheel until the train stopped but a short distance away, when he could have gotten off the cars without injury. We do not agree with the learned counsel for the appellant that this case can be distinguished in principle from Enright v. Pittsburg etc. R. R. Co., 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938, 53 L. R. A. 330. This case is on all fours with that one, except the train was moving at a less rate of speed. The train, however, was moving at such rate of speed as to make it dangerous for the boy to attempt to get off. This is evidenced by the fact that when he did make the attempt, after being frightened by the brakeman, he was run over by the train and received the injuries about which he complains. It is true the 634 boy was a trespasser, and the defendant cannot be charged with any responsibility for accidents which might ordinarily occur to him, nor was it bound to insure his safety in the dangerous position in which he had placed himself. The defendant cannot be held liable in damages in the case at bar unless it clearly appears that its employés, the two brakemen, in causing the boy to jump or fall from the moving car by threatening manner, loud calls and the flourishing of a switch club, have failed to exercise that prudence and ordinary care which the instincts of humanity and rules of law require in dealing with a child of tender years.

The learned trial judge submitted the facts to the jury to determine whether the boy did fall or jump from a moving train because of the action or threatening manner and loud

calls of the brakemen. Under the authority of our cases there was no error in so doing.

Assignments of error overruled and judgment affirmed.

For Authorities upon the question decided in the principal case, see Bjornquist v. Boston etc. R. R. Co., 185 Mass. 130, 102 Am. St. Rep. 332, and cases cited in the cross-reference note thereto; Enright v. Pittsburg etc. R. R. Co., 198 Pa. St. 166, 82 Am. St. Rep. 795.

POLLACK v. PENNSYLVANIA R. R. CO. (No. 2).

[210 Pa. St. 634, 60 Atl. 312.]

RAILROADS—Contributory Negligence of Parent.—If a father takes his nine year old boy to a place where freight-cars are shifted, and leaves him there unprotected, he precludes himself, by such contributory negligence, from a recovery of damages for injuries sustained by the boy through the negligence of the railroad company. (pp. 846, 847.)

Action by a father to recover for injuries to his child. The facts appear in the opinion of Pollack v. Pennsylvania R. R. Co. (No. 1), 210 Pa. St. 631, ante, p. 843, 60 Atl. 311.

George Demming, for the appellant.

John Hampton Barnes, for the appellee.

635 ELKINS, J. The appellant in this case is the father of a nine year old boy who sustained injuries as stated in the case just heard and decided at No. 208, January term, 1904. The court below instructed the jury that under the evidence in the case, the father had by his negligent act precluded himself from the recovery of damages, and directed the jury to return a verdict in favor of the defendant. The trial judge in the charge to the jury, inter alia, said: "The father on this occasion took this boy from his house after supper around to the very locality in which this dangerous spot was, and the law says that a parent who permits a child of tender years to run at large without a protector in a city traversed constantly by cars and other vehicles fails in the performance of his duty, and is guilty of such negligence as precludes him from recovery for the injury resulting therefrom, so that whilst you must have testimony to justify it you may find a verdict for the boy; the father, by taking the boy to the dangerous place and leaving

him there unprotected, precluded himself from the recovery of any damages, and as to the father I charge you that your verdict must be for the defendant." We see no error in this statement of fact and law. The father was guilty of such contributory negligence as to bring the case within the rule stated in Glassey v. Hestonville etc. Ry. Co., 57 Pa. St. 172, wherein Mr. Justice Strong said: "A father has no right to expose his child to such dangers, and if he does he fails in performance of his duty and is guilty of negligence. The security of the community, and [836] especially of children, demands the assertion of this doctrine." This rule has been frequently recognized in other cases, and certainly applies to the one at bar.

Assignment of error overruled and judgment affirmed.

That the Contributory Negligence of parents may bar their right of action for injuries sustained by their child, see Pratt etc. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751; Schwenk v. Kehler, 122 Pa. St. 67, 9 Am. St. Rep. 70; Norfolk etc. R. R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718; Winters v. Kansas etc. Ry. Co., 99 Mo. 509, 17 Am. St. Rep. 591; Johnson v. Reading etc. Ry., 160 Pa. St. 752, 40 Am. St. Rep. 752. As to whether the negligence of parents is imputable to their child, see Ives v. Weldon, 114 Iowa, 476, 89 Am. St. Rep. 379.

CASES

IN THE

SUPREME COURT

OF

RHODE ISLAND.

BABCOCK v. WELLS.

[25 R. I. 23, 54 Atl. 596.]

A QUITCLAIM DEED does not Carry upon Its Face Notice of a doubtful title. It no more implies a defect of title than a deed of bargain and sale which is supported by a covenant of warranty. (pp. 851, 852.)

A QUITCLAIM DEED Carries All the Interest of the Grantor. (p. 852.)

A QUITCLAIM DEED does not Charge the Grantee with Notice that the Grantor's Estate is Subject to an Equity in favor of another. (p. 853.)

NOTICE to One of Two or More Comortgagees that the title of the mortgagor is subject to an outstanding equity is not notice to the other. (p. 854.)

A. B. Crafts, for the complainant.

Dexter B. Potter, for the respondents.

24 STINESS, C. J. It appears from the pleadings that Jacob D. Babcock, deceased, left three children, John J. Babcock, Harriet E. B. Cundall and Sarah A. Humphrey, who became tenants in common of the property involved in this suit, and so occupied it up to January 30, 1877.

At that date a suit for partition, brought by Mrs. Humphrey, was pending.

It is claimed that she was indebted to her brother and sister for repairs and other expenses, on account of which she agreed to transfer her third to them for the sum of two thousand five hundred dollars, said suit to be discontinued without costs; that Babcock applied to Thomas R. Wells for said sum, who agreed to furnish it upon a mortgage of the Humphrey share,

as security; that Wells went to Providence to meet Mrs. Humprey to arrange the matter, on January 30, 1877, and took a quitclaim deed from her to himself, representing that he took it as security for the two thousand five hundred dollars paid to her, according to his arrangement with Babcock, because it was more convenient than to get a mortgage. The suit for partition was thereupon discontinued.

This bill was filed December 9, 1881, and on December 10, 1881, a restraining order against alienating or encumbering the property was entered, which is still in force. In 1898, upon conveyance by Mrs. Cundall to John J. Babcock of all her interest in the property, a decree was entered to amend the bill by making said Babcock sole complainant.

This bill is brought to redeem the one-third share transferred from Mrs. Humphrey to Thomas R. Wells by the deed of January 30, 1877, upon the ground that it operated only as a mortgage, by reason of the trust under which said Wells took the title.

The title is too voluminous to refer to in detail, and, the question being one of fact, it is sufficient to say that, both from preponderance of testimony and corroboration in conduct of the parties, we find that the deed from Mrs. Humphrey to Thomas R. Wells was taken as security, in lieu of a mortgage, for the sum of two thousand five hundred dollars, as alleged in the bill.

[25] This being so, Thomas R. Wells, held the one-third interest as trustee for Babcock and Mrs. Cundall, to be conveyed to them upon payment of the debt thereby secured: Jenckes v. Cook, 9 R. I. 520; Aborn v. Padelford, 17 R. I. 143, 20 Atl. 297; Whiting v. Dyer, 21 R. I. 86, 41 Atl. 895.

The complainant testifies that the arrangement was recognized as a loan of two thousand five hundred dollars, on which interest was to be paid at the rate of seven per cent.

After the deed from Mrs. Humphrey to Thomas R. Wells, January 30, 1877, Babcock and his sister remained in possession of the property, as owners, and collected all that was paid for rents thereof, a portion of which was leased and occupied by firms of which Thomas R. Wells was a member, Wells neither demanding nor collecting rent for the one-third share which he held by said deed.

August 1, 1877, Thomas R. Wells gave a quitclaim deed of the property conveyed to him by Mrs. Humphrey to Sylvia E. Salisbury and William R. Wells, to whom he was indebted,

reciting a consideration of two thousand five hundred dollars, although no money was in fact paid, the deed being taken on account of the indebtedness.

At the same time they gave a bond to said Thomas R. Wells to sell the property described in said deed back to him, on or before April 1, 1878, for the sum of two thousand five hundred dollars, Thomas R. Wells to occupy said property in the meantime, and to pay as rental therefor at the rate of seven per cent per annum on said sum. Thomas R. Wells did not occupy the property described in the deed, however, except as a member of firms paying rent.

The firms occupying the property, in which said Wells was a partner, failed and made assignments January 12, 1878, and the assignee paid rent up to about April 1, 1878, to Babcock, after which time the premises were unoccupied. William R. Wells claims to have taken possession April 1, 1878, that being the time named in his bond for a reconveyance. As to William R. Wells and Sylvia E. Salisbury, the grantees under the quitclaim deed from Thomas R. Wells, the question of fact arises whether they took the conveyance with notice of the equitable title of Babcock, on the ground that the deed was taken and held simply as security.

26 Upon this point Babcock testifies positively to admissions made by William R. Wells of his knowledge of the transaction. Mrs. Cundall testifies less positively to the language, but to a general admission of their right to redeem. William R. Wells denies any such admissions, but says that, preferring the money to the property, he made a voluntary offer to allow them to redeem for the sum of two thousand five hundred dollars and interest. Looking further to the conduct of the parties, it is quite significant, and, we think, corroborative of the complainant's testimony, that the bond was for the reconveyance, upon payment of the same sum, at the same rate of interest for which it is claimed to be held as security, as though William R. Wells had knowledge of such fact. It would be a remarkable coincidence if, taking the deed to settle up their own estate, they made it subject to exactly the same terms as to Thomas R. Wells that existed between said Wells and Babcock. It is also remarkable, if William was endeavoring to make a settlement and an end of the matter, he should have made the same offer to Babcock after he, William, supposed he had got an absolute title. His conduct is more compatible with the complainant's claim than with his own. Moreover, if he and his sister had

an absolute title as against Babcock, they would have been entitled to a share of the rents; but they did not claim it. Still further, the assignee sold the assets of Thomas R. Wells on March 29, 1878, among which was this bond, with only two more days to run according to its terms. William R. Wells bought the bond at the auction, and then claimed that he owned the equity of redemption under the deed from Thomas R. Wells. He therefore very clearly recognized his deed as an equitable mortgage as to Thomas, and although the evidence is not so clear that he and his sister knew of the relation of Thomas to the complainant as it is that Thomas knew it, still we think it fairly shows that they knew of the complainant's equitable claim.

Taking the deed with notice, the property was subject to redemption in the hands of William R. Wells and Mrs. Salisbury.

November 8, 1875, J. J. Babcock and Mr. and Mrs. Cundall [27] executed a mortgage to Thomas R. Wells on their two-thirds interest in a part of the property in question, to secure a note for five thousand dollars dated October 25, 1875; a second mortgage dated October 24, 1876, on the same interest in other parts of the property, to secure the same note; and on the same day they executed a similar mortgage on their two-thirds interest in the mill machinery, to further secure the same note.

These mortgages were assigned by Thomas R. Wells to Sylvia E. Salisbury and William R. Wells, August 1, 1877, who claim to have foreclosed the personal property mortgage by taking possession, April 1, 1878.

Under the power of attorney in the other two mortgages they advertised the real estate for sale, and sold it, on August 1, 1878, to themselves as purchasers.

Passing by the alleged defects and irregularities of the sale and assuming it to be valid, Sylvia E. Salisbury and William R. Wells were then the apparent holders of the record title, with notice of the complainant's claim of equitable title to one-third of the property under the deed of Sarah A. Humphrey.

On December 18, 1878, Sylvia E. Salisbury and William R. Wells gave two mortgages on the land in question: One to Oliver Langworthy and John D. Kenyon, to secure their indorsements of notes of the mortgagors to an amount not exceeding two thousand five hundred dollars; and another in similar terms, on the same with other land, to Oliver Langworthy, subject to the mortgage to said Langworthy and Kenyon.

The title to the property stood in this way at the time of the

filing of the bill, December 9, 1881. After the filing of the bill, the rule of lis pendens applied.

The complainant claims that, as the deed from Thomas R. Wells to Wm. R. Wells and Mrs. Salisbury was a quitclaim deed, the grantees cannot be held to be purchasers without notice; that a quitclaim deed, being a mere release, carries upon its face notice of a doubtful title.

There are cases which have supported such a claim, but we do not see that they rest upon a sound principle. A transfer of one's right, title and interest in land no more implies a defect of title than a deed of bargain and sale which is as supported by a covenant of warranty. There is no question that a quitclaim deed will carry all the interest that the grantor has. A warranty deed, so far as the grant is concerned, can do no more. The stronger inference, if notice is to depend upon that, would seem to be more favorable to the purchaser's belief of a good title in the case of a quitclaim deed than in the case of a warranty deed; for in the former case he is willing to take the grantor's interest as it stands, thereby implying satisfaction with it, while in the latter case the purchaser requires a warranty, implying a need of security to fall back upon, as though he had some doubt of the sufficiency of the title. It cannot be said that there is an implication of defect under a quitclaim and not under a warranty deed. A warranty does not enlarge a grant; it is a covenant of indemnity for a disturbance of it. How can a court say, as a matter either of law or fact, that a quitclaim implies that the grantor has reason to believe his title is defective, because he does not warrant it, when an equally reasonable inference may be that he wants the purchaser to satisfy himself as to the title from the records or otherwise, and that he is unwilling to burden his estate by covenants, running into the future, against defects of which he has no more knowledge than the purchaser. A very large proportion of conveyances of real estate are by quitclaim deed. Under the statute in force when this deed was given, one form was as effectual for delivery of seisin as another: Gen Stats., cap. 162, sec. 2. This is more largely stated in General Laws, caption 202, section 11—that any form of conveyance, duly executed, shall be operative to convey to the grantee "all the possession, estate, title and interest, claim, demand, or right of entry or action of the grantor, absolutely, in and to the land conveyed, unless otherwise expressly limited," and that if duly recorded it shall be operative as

against third parties. Doubtless it is true that quitclaim deeds are often obtained for speculative purposes, but the test of their effect is the fact of a purchase in good faith without notice of a defect in title.

As Mr. Justice Field said, in Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. Rep. 426, 37 L. ed. 350: "The character of a bona fide purchaser must depend upon attending circumstances or proof as to the transaction, [29] and does not arise as often, though we think inadvertently said, either from the form of the conveyance or the presence or the absence of any accompanying warranty."

In Flagg v. Mann, 2 Sum. 486, Fed. Cas. No. 4847, Judge Story held that a quitclaim deed, where the circumstances showed that it was not intended to operate merely by way of passing a right or by way of extinguishment, was to be treated as a bargain and sale, or other lawful conveyance, saying: "It ordinarily affords very conclusive proof that the purchase is of the whole estate and not of the mere right or title of the party, whatever it may be": See, also, United States v. California Land Co., 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37 L. ed. 354; Stark v. Boynton, 167 Mass. 443, 45 N. E. 764; Smith v. McClaim, 146 Ind. 77, 45 N. E. 41; Bennett v. Davis, 90 Me. 457, 38 Atl. 372; Schott v. Dosh, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 346; White v. McGarry, 47 Fed. 420.

We think the better authority is with these cases, which fully sustain the views we have expressed.

If then, as we hold, the mortgagees are not chargeable with notice of the plaintiff's equitable estate by reason of the conveyance to the mortgagor by a quitclaim deed, it follows that they may be regarded as purchasers for value, unless actual notice to them is shown. The testimony shows that Oliver Langworthy had notice, on February 11, 1878, of Babcock's claim that the one-third of the estate was taken by Thomas R. Wells simply as security for the money paid to purchase Sarah A. Humphrey's share, and that this notice was given ten months before the mortgage to said Langworthy and Kenyon.

As to Kenyon, we are referred to no actual notice to him, prior to the taking of the mortgage.

The question therefore arises, Did notice to his comortgagee operate as notice to him?

In Snyder v. Sponable, 1 Hill (N. Y.), 567, it was held that notice to a husband at the time of receiving a conveyance to himself and wife, was not notice to the wife of a prior unre-

corded mortgage, so as to give the mortgage a preference in respect to her title, unless the consideration was paid by the husband, thus showing that she was not a purchaser for value. This decision was affirmed in 7 Hill, 427.

[30] In Wait v. Smith, 92 Ill. 385, it was held that joint purchasers who had notice of an encumbrance would hold their title subject to it, while those who had no notice would not. In Burt v. Batavia, 86 Ill. 66, it was held that notice of an encumbrance, on property purchased by a corporation, to one of several incorporators would not charge his associates, when he did not act as their agent in forming the company.

To the same effect is Rippetoe v. Dwyer, 65 Tex. 703; Wiswall v. McGown, 2 Barb. (N. Y.) 270. See, also, Arnold v. Greene, 15 R. I. 348, 5 Atl. 503; Holland v. Citizens' Bank, 17 R. I. 87, 20 Atl. 231.

We think that the rule thus indicated is founded in reason and equity, and that it applies in this case. The mortgage, however, was simply one of indemnity to the mortgagees, Langworthy and Kenyon, for indorsement of the notes of the mortgagors, William R. Wells and Sylvia E. Salisbury. We are unable to find from the testimony whether Kenyon ever became entitled to indemnity under the mortgage, so as to give him a right to claim under it, and we leave the case open for evidence upon that point.

We decide that at the time of filing this bill the complainants had an equitable interest in one-third of the estate conveyed by the deed of Sarah A. Humphrey, subject to the payment of the consideration therefor, and subject also to the question above stated in regard to the mortgage to Kenyon and Langworthy.

QUITCLAIM DEEDS.

I. What Deeds are Quitclaim, 854.
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I. What Deeds are Quitclaim.

Within the meaning of these terms as they are employed in this note, all instruments must be regarded as quitclaim deeds which

purport to release or convey only such title or interest as the grantor may have in the lands described. The words usually used are "remise, release and quitclaim." These words clearly manifest the intention of the grantor to convey to the grantee such interest or title as the former has in the property, and none other. Any other words which express the same purpose must be given a like effect and be subject to a like restriction. Thus, instead of employing the words of conveyance quoted above, the grantor may by his deed declare that he grants, bargains and sells all his right, title and interest, or all his right, title, claim and demand in and to the tract described; in which event, the instrument passes whatever title or right might have passed by a quitclaim deed: Fash v. Blake, 38 Ill. 363; but none other: Daugherty v. Yates, 13 Tex. Civ. App. 646, 35 S. W. 937; Hunter v. Eastham, 95 Tex. 648, 69 S. W. 66; Lamb v. Kamm, 1 Saw. 238, Fed. Cas. No. 8017. Terms in the deed, other than the mere words of conveyance, may throw light on the purpose of the grantor, and where such is the case, they should be given due effect. Hence, whatever difference of opinion may result in the application of the rule, there is little or no doubt, though words of quitclaim are used in a conveyance, yet, if they are supplemented by other words showing an intention to deal with the land and to convey it, rather than to merely release such interest as the grantor has, such conveyance is not a mere quitclaim. Thus, conveyances purporting to sell, convey, release and quitclaim all the grantor's title, claim, interest and demand to the grantee in specified lands, to have and to hold unto him, his heirs and assigns forever were held, in Texas, to clearly show that the parties intended by the instruments to convey the land itself, and hence that such instruments were not merely quitclaim deeds: Garrett v. Christopher, 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67; Baylor v. Scottish-American Mtg. Co., 66 Fed. 631, 13 C. C. A. 659.

II. The Effect of Quitclaim Deeds.

a. For the Purpose of Transmitting the Title or Estate of the Grantor.—At the common law, a deed of release or quitclaim was appropriate and effective in certain cases only. Where the question was presented in Alabama of the effect of a conveyance by different mortgagors to a bank, the court said: "The instrument under which the bank claims is a quitclaim deed, or what is more appropriately designated by the common-law term, a release. The effective words are 'that the said Dubose doth remise, release and forever quitclaim all his right, title, claim, etc., unto the said Branch Bank, in full and actual possession now being, and its successors and assigns forever.' It is said in the Touchstone (page 320) that the words most common in a release are remisi, relaxavi and quietum clamavi; and that a release may inure by way of passing an estate, as where one joint tenant or copartner releases his right to the other; or by way of passing the right, as where the disseisee releases to the dis-

seisor; or it may operate by way of enlarging an estate, where the releasee has an estate capable of being enlarged and is in privity with the releasor; or by way of extinguishment: Gilbert on Tenancy, 55; Shepherd's Touchstone, 321; Coke's Littleton, 272; 2 Bouvier's Institutes, p. 412. At the common law it is said a freehold could be released in five ways: 1. To the tenant of the freehold in fact or in law without any privity; 2. To the remainderman; 3. To the reversioner without privity; 4. To one having a right only by privity; and 5. To one having a privity only without right: 2 Bouvier's Institutes, 412; Gilbert on Tenancy, 53; Coke's Littleton, 265. So that according to the principles of the common law governing releases, the bank, the releasee in this case, filling none of the above requisites, could not take the title of the releasor": Smith's Heirs v. Branch Bank, 21 Ala. 125; Smith v. Pendell, 19 Conn. 107, 48 Am. Dec. 146.

The common-law limitations upon the effect of quitclaim deeds do not, so far as we can discover, prevail in any part of the United States. Such deeds are here operative to transfer from the grantor to the grantee all title and interest of the former, whatever its character or extent, in the property described: Smith's Heirs v. Branch Bank, 21 Ala. 125; Carpentier v. Williamson, 25 Cal. 154; Lawrence v. Ballou, 37 Cal. 521; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Bradbury v. Davis, 5 Colo. 265; Sherwood v. Barlow, 19 Conn. 471; Staples v. Bradley, 23 Conn. 167, 60 Am. Dec. 630; Platt v. Brown, 30 Conn. 336; Hoyt v. Ketsham, 54 Conn. 60, 5 Atl. 606; McConnell v. Reed, 5 Ill. 117, 38 Am. Dec. 124; Butterfield v. Smith, 11 Ill. 485; Prettyman v. Walston, 34 Ill. 175; Grant v. Bennett, 96 Ill. 513; Robinson v. Appleton, 22 Ill. App. 351; Wagner v. Winter, 122 Ind. 57, 23 N. E. 754; Conn's Heirs v. Manifee, 2 A. K. Marsh. 396, 12 Am. Dec. 417; Kitchell v. Mudgett, 37 Mich. 81; Kerr v. Freeman, 33 Miss. 292; Mitchell v. Tucker, 10 Mo. 260; Wilson v. Albert, 89 Mo. 537, 1 S. W. 209; Curtis v. Zutavern (Neb.), 93 N. W. 400; Thorndike v. Norris, 24 N. H. 454; Lintner v. Snyder, 15 Barb. 621; Uihlein v. Matthews, 172 N. Y. 154, 64 N. E. 792; Hall's Lessee v. Ashby, 9 Ohio, 96, 34 Am. Dec. 424; Hill v. Grant (Tex. Civ. App.), 44 S. W. 1016; Cauble v. Worsham, 96 Tex. 86, 97 Am. St. Rep. 871, 70 S. W. 737; McInerney v. Beck, 10 Wash. 515, 39 Pac. 130; Traver v. Baker, 15 Fed. 186, 8 Saw. 535; Field v. Columbet, 4 Saw. 523, Fed. Cas. No. 4764.

The usual effect of a quitclaim deed may, however, be restricted by other words in the conveyance, as where it purports to release or convey a specified interest of the grantor, under a designated contract or deed, in which event any interest he may have other than that thus specified is thus reserved by his restricted quitclaim: Barr v. Foster, 25 Colo. 28, 52 Pac. 1101; Allen v. Hall, 31 Colo. 206, 73 Pac. 844. The effect of a quitclaim deed may also be restricted by the old rule, where it still prevails, that a deed or release can operate only in favor of a person having some pre-existing interest in the property; or, though this rule does not prevail in its entirety,

by the fact that the estate of the grantor is of such a character that it can be conveyed only to some person or to some member of a specified class of persons. Thus, where "unassigned dower is not subject to transfer or sale or can only be released to one in privity with the title under which the doweress claims," a deed of quitclaim purporting to be of a whole of specified premises is inoperative if made to one having no interest in the fee, and if the grantee has an interest in a moiety only of the fee is operative as to that moiety merely: Fletcher v. Shepard, 174 Ill. 262, 51 N. E. 212.

b. **As to Subsequently Acquired Title.**—Except in so far as the grantee may be protected by the registration laws to be hereinafter considered, the effect of a quitclaim deed is limited to the estate or interest held by the grantor at the time of its execution: Frink v. Darst, 14 Ill. 304, 58 Am. Dec. 575; Benton v. Sentell, 50 La. Ann. 869, 24 South. 297. Hence, if he was then the owner of one interest and afterward acquired another, or then had no interest whatever and afterward acquired the title in the fee, or any lesser interest, he is not estopped by a deed of quitclaim from asserting against his grantee and his successor in interest any title or right acquired after the execution of such deed: Koutz v. Davis, 34 Ark. 593; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Morrison v. Wilson, 30 Cal. 344; Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500; Quivey v. Baker, 37 Cal. 465; Miller v. Scofield, 12 Conn. 335; Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592; Torrence v. Shedd, 112 Ill. 466; Graham v. Graham, 55 Ind. 33; Bryan v. Uland, 101 Ind. 477, 1 N. E. 52; Thorp v. Hanes, 107 Ind. 324, 6 N. E. 920; McClure v. Raben, 133 Ind. 507, 36 Am. St. Rep. 558, 33 N. E. 275; Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331; Simpson v. Greeley, 8 Kan. 596; Bruce v. Luke, 9 Kan. 201, 12 Am. Rep. 491; Loomis v. Pingree, 43 Me. 299; Harriman v. Gray, 49 Me. 537; Quarles v. Quarles, 4 Mass. 680; Frost v. Missionary Society, 56 Mich. 62, 22 N. W. 189; Fay v. Wood, 65 Mich. 390, 32 N. W. 614; People v. Miller, 79 Mich. 93, 44 N. W. 172; Bramlett v. Roberts, 68 Miss. 325, 10 South. 56; Martin v. Brown, 4 Minn. 282; Hope v. Stone, 10 Minn. 141; Everest v. Ferris, 16 Minn. 26; Marshall v. Roberts, 18 Minn. 405, 10 Am. Dec. 201; Gesner v. Burdell, 18 Minn. 497; Johnson v. Robinson, 20 Minn. 169; Gibson v. Choteau, 39 Mo. 536; Pleasant v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624; 58 N. W. 423; Hardin v. Cullins, 8 Nev. 49; Bell v. Twilight, 26 N. H. 401; Jackson v. Hubble, 1 Cow. 613; Woodcock v. Bennett, 1 Cow. 711, 13 Am. Dec. 568; Jackson v. Peek, 4 Wend. 300; Cramer v. Benton, 64 Barb. 522; Manwarring v. Terry, 39 Tex. 67; Perrin v. Perrin, 62 Tex. 477; Smith v. Pollard, 19 Vt. 272; Sydnor v. Palmer, 29 Wis. 226; Jourdain v. Fox, 90 Wis. 99, 62 N. W. 936.

A deed may contain words of conveyance other than those of quitclaim, or may otherwise affirm that the grantor has a title or interest in the property, and if so, such other words or such affirmance is not deprived of effect by the use of the words of quitclaim. The

reason why the quitclaim does not convey after-acquired title is because it does not, on its face, purport to do so, nor in any way assert that the grantor has any title or interest to convey. If, however, a deed, whatever be the words of conveyance, does, in express terms or by necessary implication, affirm that the grantor has title, or purports to convey title rather than some interest, then the grantor and his successors are bound by the affirmation thus made: Hagensick v. Castor, 53 Neb. 495, 73 N. W. 932; Bayley v. McCoy, 8 Or. 261; Lindsay v. Freeman, 83 Tex. 264, 18 S. W. 729; Reynolds v. Cook, 83 Va. 821, 5 Am. St. Rep. 319, 3 S. E. 713.

An apparent, though not a real, exception to the rule that a quitclaim deed does not transfer a subsequently acquired title exists when the purchaser at an execution or judicial sale, or one who has taken proceedings to acquire title to land from the state, or the United States conveys by a quitclaim, and subsequently receives a sheriff's deed on the expiration of the time for redemption, or a patent on fully complying with the provisions of the law entitling him thereto. In each case the legal title when acquired relates to the date of the sale or inception of the title (note to Jackson v. Ramsay, 15 Am. Dec. 246), and hence a quitclaim deed executed after the date to which a subsequent deed or patent relates, vests the grantee with the title acquired by such subsequent deed or patent: Crane v. Salmon, 41 Cal. 63; Thompson v. Spencer, 50 Cal. 532; Welch v. Dutton, 79 Ill. 465; Edwardsville Ry. Co. v. Sawyer, 92 Ill. 377; Gibbons v. Choteau, 39 Mo. 536; Magruder v. Esmay, 35 Ohio St. 221; Morrison v. Faulkner (Tex. Civ. App.), 21 S. W. 984.

c. **As to Equities Existing Against the Grantor.**—Equities existing against the grantor of a quitclaim deed are enforceable against his grantee, except in so far as this rule may be modified by the registration acts of the state: Allison v. Thomas, 72 Cal. 562, 1 Am. St. Rep. 89, 14 Pac. 309; Young v. Charnquist, 114 Iowa, 116, 86 N. W. 205; Mann v. Best, 62 Mo. 491; Campbell v. Laclede G. Co., 84 Mo. 352; Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595; Arlington M. E. Co. v. Yates, 57 Neb. 286, 77 N. W. 677; James v. Drake, 39 Tex. 143; Threadgill v. Bickerstaff, 87 Tex. 520, 29 S. W. 757. This necessarily follows from the principle that such a conveyance transfers only such title as the grantor has, and if this title is subject to pre-existing equities in his hands, it must be equally so when the title reaches the hands of his vendee.

d. **Under the Registration Laws.**—Under the registry acts in force in the several states, instruments affecting the title to real property are entitled to be filed for record and recorded in some public office, and all persons must thereafter take notice of their contents, and, on the other hand, as to such instruments not so filed nor recorded, and generally as to equities existing against the grantor, whether evidenced by writing or not, subsequent purchasers or encumbrancers in good faith, for value, and without notice are

not prejudiced thereby, provided the instruments under which their encumbrance or title is acquired are first filed for record. Under these statutes, the question has arisen in nearly, if not all, of the states whether the grantee in a quitclaim deed may be regarded as within their protection as against prior conveyances or encumbrances executed by their grantors or prior equities existing and enforceable against them. The argument has generally prevailed that as a quitclaim deed purports to convey only the interest of the grantor, it cannot have any operation when he has already parted with his interest, and that it is not material that his grantee had no actual notice of that fact; that the restricted language of the conveyance is equivalent to notice, and, as a final result, that he who accepts such a conveyance cannot, within the meaning of the registry acts, be a bona fide purchaser and as such entitled to protection against prior conveyances or encumbrances made by his grantor or equities existing against him: Derrick v. Brown, 66 Ala. 162; McMillan v. Rushing, 80 Ala. 402; O'Neal v. Seixas, 85 Ala. 80, 4 South. 745; Wood v. Holly M. Co., 100 Ala. 326, 46 Am. St. Rep. 56, 13 South. 948; Fries v. Griffin, 35 Fla. 212, 17 South. 66; Steele v. Sioux Valley Bank, 79 Iowa, 339, 18 Am. St. Rep. 370, 44 N. W. 564, 7 L. R. A. 524; Hannan v. Seidentopf, 113 Iowa, 659, 86 N. W. 44; Minneapolis etc. R. Co. v. Chicago etc. R. Co., 116 Iowa, 681, 88 N. W. 1082; Nash v. Bean 74 Me. 340; Reed v. Knights 87 Me. 181, 32 Atl. 876; Peters v. Carter, 80 Mich. 124, 20 Am. St. Rep. 508, 45 N. W. 73; Beakley v. Robert, 120 Mich. 209, 79 N. W. 193; Messenger v. Peter, 129 Mich. 93, 88 N. W. 209; Mason v. Black, 87 Mo. 329; Shradski v. Albright, 93 Mo. 42, 5 S. W. 807; Marshall v. Roberts, 18 Minn. 405, 10 Am. Rep. 201; McAdow v. Black, 6 Mont. 601, 13 Pac. 377; Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717; Pleasants v. Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; Richards v. Snyder, 11 Or. 501, 6 Pac. 186; American M. Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515; Fowler v. Will (S. Dak.), 102 N. W. 598; Lowry v. Brown, 1 Cold. 456; Williamson v. Williams, 11 Lea, 355; Hows v. Butterworth (Tenn. Ch. App.), 62 S. W. 1114; Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; Culmell v. Borroum, 13 Tex. Civ. App. 458, 35 S. W. 942; Carter v. Wise, 39 Tex. 273; Milan County v. Bateman, 54 Tex. 153; Huff v. Crawford, 89 Tex. 214, 34 S. W. 606; Martin v. Morris, 62 Wis. 418, 22 N. W. 525; Oliver v. Piatt, 3 How. (44 U. S.) 333, 11 L. ed. 622; Morris v. Wheat, 8 App. D. C. 379; United States v. Sliney, 21 Fed. 894; Dodge v. Briggs, 27 Fed. 160; Gest v. Packwood, 13 Saw. 202, 34 Fed. 368. In a few of the states, the middle ground is taken that a quitclaim deed puts the purchaser on inquiry, but does not necessarily exclude him from the protection due to a bona fide purchaser: Miller v. Fraley, 23 Ark. 735; Johnson v. Williams,

37 Kan. 182, 1 Am. St. Rep. 246, 14 Pac. 537; Merrill v. Hutchinson, 45 Kan. 59, 23 Am. St. Rep. 713, 25 Pac. 215; Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708; Runyon v. Smith, 18 Fed. 579; McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, 36 L. ed. 788; and in a still larger number it is held that the grantee of a quitclaim deed occupies the same position under the registry acts as the grantee in any other form of conveyance—that is to say, if he shows himself to be a purchaser in good faith and for value, he is not charged with notice of, nor otherwise to be prejudiced by, conveyances or encumbrances made by his grantor or equities existing against him under circumstances in which he would not be affected if the conveyance to him purported to be of the fee: Graff v. Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 335; Nidever v. Ayres, 83 Cal. 39, 23 Pac. 192; Brown v. Banner etc. Co., 97 Ill. 214, 37 Am. Rep. 105; Fleetwood v. Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; Davidson v. Coon, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584; Smith v. McClain, 146 Ind. 77, 45 N. E. 41; Strong v. Lyon, 38 Minn. 315, 37 N. W. 448; Chapman v. Sims, 53 Miss. 154; Boogher v. Neece, 75 Mo. 383, 42 Am. Rep. 413; Willingham v. Hardin, 75 Mo. 429; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609, 18 S. W. 907; Elliott v. Buffington, 149 Mo. 663, 51 S. W. 408; Schott v. Dosh, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 386; Wilhelm v. Wilken, 149 N. Y. 447, 52 Am. St. Rep. 743, 44 N. E. 82, 32 L. R. A. 370; Ellison v. Torpin, 44 W. Va. 427, 30 S. E. 188; Cutler v. James, 64 Wis. 178, 54 Am. Rep. 606, 24 N. W. 874. This view has gained ground, especially since reinforced by the opinions of the supreme court of the United States in Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. Rep. 426, 37 L. ed. 350, and United States v. California & O. Land Co., 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37 L. ed. 354, in the former of which it was said: "The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defects in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance

in such form as to imply a warranty of any kind, even when the title is known to be perfect. He may hold the property only as a trustee, or in a position of official character, and be unwilling for that reason to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than that of quitclaim or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a bona fide purchaser, however free, in fact, his conduct in the purchase may have been made from the imputation of the want of good faith. In many parts of the country a quitclaim deed or a simple conveyance of the grantor's title is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to devest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale. If the grantor in either case at the time of the execution of the deed possesses any claim to, or interest in, the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to, or interest in, the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim or interest in the premises, which he may possess without asserting the ownership of either. If in such case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a bona fide purchaser. But in either case if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of fact which, if followed up, would lead to a knowledge of such outstanding conveyance in equity, he is entitled to protection as a bona fide purchaser, upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, as against encumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction. Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are

separate contracts, intended only as guaranties against future contingencies. The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not release, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or the clear title, must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them will, besides the payment of a reasonable consideration, determine the bona fide character of the transaction on his part."

Even where the rule prevails that a grantee in a quitclaim deed cannot be deemed a bona fide purchaser, it does not extend to purchasers from such grantee whose conveyances are not by quitclaim. In other words, the fact that there is a quitclaim deed in the chain of title does not anywhere discredit it, so that there cannot thereafter be bona fide purchasers under it. On the contrary, a purchaser of property from one who has acquired title by a quitclaim deed is entitled to the protection of the registry acts to the same extent as if there had been nothing but warranty deeds in the whole chain of title: Meikel v. Borders, 129 Ind. 529, 29 N. E. 29; Winkler v. Miller, 54 Iowa, 476, 6 N. W. 698; Chapman v. Sims, 53 Miss. 154; Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132; Sherwood v. Moelle, 36 Fed. 478, 1 L. R. A. 797; United States v. California & O. Land Co., 148 U. S. 31, 13 Sup. Ct. Rep. 458, 37 L. ed. 354; Stanley v. Schawalby, 162 U. S. 255, 16 Sup. Ct. Rep. 754, 40 L. ed. 960.

e. **When Covenants of Title are Inserted.**—The effect of covenants in a quitclaim deed is a matter of construction. If they affirm the existence of some estate in the grantor, he is doubtless bound by them, but the general rule is, that the effect of covenants is restricted to the estate or interest granted. Hence, though a deed contains covenants general in terms, yet if the purport of the conveyance is that the grantor conveys all his right, title and interest in the property, the words of covenant are restricted to the interest thus conveyed. Therefore, no liability can attach against the grantor, nor can his subsequently acquired title or interest be affected by the covenants, or he estopped from asserting it: Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 37, 27 S. W. 78; Coe v. Persons Unknown, 43 Me. 432; Ballard v. Child, 46 Me. 154; Allen v. Holton, 20 Pick. 458; Sweet v. Brown, 12 Met. 175, 45 Am. Dec. 243; Higman v. Stewart, 38 Mich. 513; White v. Brocaw, 14 Ohio St. 344; Bumpass v. Anderson (Tex. Civ. App.), 51 S. W. 1102; Brown v. Jackson, 3 Wheat. 449, 4 L. ed. 432; Van Rensselear v. Kearney, 11 How. 297, 13 L. ed. 703; Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. Rep. 147, 30 L. ed. 396. If the covenants in a conveyance can be held to be

operative, the instrument is something more than a quitclaim, as where, though words of quitclaim are used, there are other words indicating an intention to convey the fee (People v. Herbel, 96 Ill. 384), or expressly covenanting against a designated outstanding claim of title: Blake v. Tucker, 12 Vt. 39.

III. Estoppel.

No estoppel arises either from making or accepting a quitclaim deed. Both the grantor and the grantee remain at liberty to prove that no interest or estate was transmitted thereby. Hence, as we have already shown, the grantor may assert any title subsequently acquired by him, and the grantee, whenever the question becomes material, may show that his grantor had no estate, right, title or interest to convey, and consequently, that nothing passed by the deed: City and County of San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Flagg v. Mann, 14 Pick. 467; Bigelow v. Finch, 11 Barb. 498; Kingman v. Sparrow, 12 Barb. 21; Tefft v. Munson, 63 Barb. 31; Lytle v. Beveridge, 58 N. Y. 592; Farnum v. Loomis, 2 Or. 29. Possibly an exception exists to the rule that no estoppel can arise from quitclaim deeds when it appears that two or more persons claim title from a common source, and such claim is based upon a quitclaim deed, and one of the grantees attempts to deny the title of the common grantor. This is somewhat vaguely indicated in Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867, which was an action of ejectment to recover the undivided one-half of certain designated premises. One Evans, being in possession of the premises, conveyed them to Rego and Hammond, and the latter afterward transferred all his right and title to the defendant Van Pelt, who went into possession and denied the plaintiff's right to the undivided one-half of the property, on the ground that Evans, at the time of the execution of the conveyance, had no estate or interest in the premises. It was held, however, that under the circumstances the defendant was not at liberty to dispute the title of Evans, who was the common grantor of the plaintiff and of the defendant's predecessor in interest.

IV. Recovery of Purchase Money Paid for.

Whatever be the consideration of a quitclaim deed, it is paid for such estate or interest as the grantor may have, if any, and the proof that he had no title or interest whatsoever does not show a failure of consideration, nor entitle the grantee to the return of the price paid. Caveat emptor is the rule applicable to his purchase, and it precludes him from recovering any part of the purchase price, though he believed he was acquiring a perfect title to the property, and nothing in fact passed by the deed: Botsford v. Wilson 75 Ill. 132; Butman v. Hussey, 30 Me. 263. Of course, this rule may be inapplicable where the payment of the purchase price was induced by some misrepresentation or other fraud on the part of the grantor.

STATE v. NAGLE.

[25 R. I. 105, 54 Atl. 1063.]

EVIDENCE.—A Confession is a Voluntary Acknowledgment of Guilt, and an Admission, though not amounting to a confession, must be regarded as in the nature of one if it has a vital bearing upon a highly important link in the chain of circumstantial evidence relied upon by the prosecution. It should be excluded from evidence if made under circumstances which would exclude a confession. (p. 867.)

EVIDENCE.—A Confession, to be Admissible, must be free and voluntary; that is, must not be extracted by any sort of threat or violence, nor obtained by any direct or implied promise, however slight, nor under the exertion of any improper influence. (p. 868.)

EVIDENCE—Confessions, When not Deemed Voluntary.—If a person accused of murder and in charge of an officer is told by him that the truth, whatever it might be, ought to be told; that it always was best, except where it would be the means of conviction, and then he should prefer it if it was his case, that there was ample proof that she had bought the revolver with which the crime had been committed, and that she might as well say whether or not she had bought it, her subsequent admission to him during the same conversation as to her purchase of such weapon cannot be deemed voluntary, because what he said tended to convey to her mind that she might gain some advantage by admitting that she bought the weapon. (p. 869.)

EVIDENCE.—A Confession is not Admissible if Made to an Officer, where it is in response to a request or admonition given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession. (p. 869.)

EVIDENCE.—A Confession is not Inadmissible Solely on the Ground that it was made by the prisoner to an officer in whose custody he was. (p. 869.)

EVIDENCE—Experiments.—An expert in gunshot wounds, who has conducted a series of experiments with pistols of the same caliber as that with which a murder was committed, as well as of the pistol in question, as to the nature and effect of wounds inflicted thereby and of the manner in which they are produced, may be permitted to testify as to the result of such experiments. His testimony is not to be excluded as ex parte and manufactured evidence. (p. 871.)

EVIDENCE—Corroboration.—The fact that certain experiments were not necessary in the establishment of a fact sought to be shown by the prosecution does not require their exclusion from evidence, if they tend to corroborate a position taken by an expert witness whose evidence has been received, for whenever the opinion of a person is deemed to be relevant, the grounds on which it is based are also relevant. (p. 871.)

Charles F. Stearns, attorney general, for the state.

George R. Macleod, for the defendant.

[106] TILLINGHAST, J. The defendant, who has been convicted of the crime of murder, now petitions for a new trial on various grounds, amongst which are certain alleged erroneous rulings of the trial court in the admission of testimony.

The defendant's husband, James Nagle, came to his death on the fourteenth day of November, 1901, at about 5 o'clock in the morning, from the effect of a pistol shot which was fired into his head while he was in bed, or on the bed, in his own house in East Providence.

Shortly after the fatal shot was fired the defendant called in some of her neighbors and told them that her husband had shot himself; which statement was then accepted by them, as it also was by the medical examiner, who appeared a few moments later, as being true. The day following, however, in view of certain circumstantial evidence which had been discovered in relation to the taking off of the deceased, and particularly in relation to the alleged purchase by the defendant, a short time before, of a pistol at the store of Halliday Brothers in East Providence, she was arrested upon a criminal complaint charging her with the murder of her husband. Upon being arraigned in the district court of the seventh judicial district she pleaded not guilty to said charge, and was ordered committed to jail to await a preliminary examination in said court. She was committed to jail by Samuel S. Barney, town sergeant and mittimus officer of the town of East Providence, and while on the way to jail in his custody certain statements or admissions were made by her, according to his testimony, to which he was allowed to testify, against the defendant's objection, in the trial of the indictment now before us.

Before testifying to such statements or admissions, the witness was inquired of by the attorney general as to whether any inducement was offered to defendant to talk about the [107] affair; also whether the witness tried to get her to talk with him about it, or whether he made any threat to her in the premises. His answer was that he had no inducement to hold out to her and actually held out none; whereupon he was permitted, against the defendant's objection, to testify to the conversation which took place between them. He testified as follows: "She insisted on her innocence. She said 'They have found me guilty and bound me over to the grand jury—guilty of killing Jimmy. I am innocent; I did not kill him.' I said to her, 'You have an undoubted right to plead guilty or not guilty—that is your privilege. There is no reason why

you should 'plead guilty—you have that privilege—the court allows you that either way.' There was nothing further said about the matter of killing directly. She said something about the pistol—she says, 'I didn't buy a pistol. In fact,' she says, 'I was never in Halliday's store in my life.' I reminded her that nothing had been said about Halliday's store, that I hadn't mentioned it. She talked rather incoherently about some other matters, and I asked her a question. I said, 'What did you pay for the pistol?' She said, 'Two dollars.' She didn't say where she bought it directly. 'Well,' I said, 'did you pay for the cartridges?' She said, 'They gave me the cartridges in the store.' Q. Was there anything said in that conversation about insurance on James Nagle's life? A. There was. She said that she had two insurance policies, if I remember correctly, two hundred dollars each, or something to that effect. 'If I am proven and found guilty I shall lose that, I would not get a cent of it.'"

In cross-examination the court said to defendant's counsel: "You can ascertain now about those threats and the inducements held out." The witness then stated that he told defendant that the truth, whatever that might be, ought to be told, but that she had an undoubted right to plead guilty or not guilty in regard to any part of the case which was coming before the court. That he also told her: "The truth is always the best except where it would be a means of conviction, and even then I should prefer, if it was my case, to tell the truth. Q. And you told her that before she said these things? A. Yes, sir; I told her so always."

108 In view of these admissions on the part of the witness Barney, the defendant's counsel then requested that the jury be instructed not to consider said testimony, on the ground that witness had no right to give her advice at all, or hold out any inducements. This request was denied, and the defendant duly excepted thereto.

In further cross-examination witness testified that he said to defendant: "It is thought that you bought this revolver: but she said, 'No, sir; I did not buy it.' I said to her, 'There is no question but what you bought the revolver, and if you did you will gain nothing by denying it.' Also 'It would be better for you to tell the truth; we have ample proof that you purchased this revolver.' That she said: 'I did not, and I never was in Halliday's store in my life.' I remarked that I did not mention Halliday's store in the matter at all. 'Now,'

I said, 'having mentioned the place where you bought it, you might just as well say whether or not you bought it. What did you pay them for that revolver?' She said 'I paid them two dollars for it, and they gave me the cartridges.'" Defendant then told witness where she had put the revolver, but she persistently denied ever having used it upon her husband.

The question raised by the defendant's exception, broadly considered, is whether the court erred in not granting defendant's request to instruct the jury not to consider any part of said Barney's testimony which related to statements or admissions made by defendant concerning the purchase of the pistol and the procuring of the cartridges therefor.

Although the statements or admissions in question did not amount to a confession within the strict legal import of that term—a confession being a voluntary acknowledgment of guilt, or, as well and concisely defined in Stephen's Digest of the Law of Evidence, page 72, "A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime"—yet, as said admissions had a vital bearing upon a highly important link in the chain of circumstantial evidence relied on by the prosecution, we must regard them as in the nature of a confession. Indeed, we think it is manifest from the record 100 that the sole ground upon which the proof of the conversation above set out was tendered by the prosecution was that it was in the nature of a confession. And this being so, it follows that, in determining whether the proper foundation for its admission was laid, or, rather, whether the trial court erred in not ruling it out, as requested by defendant, it is immaterial how far the confession tended to prove guilt. "Having been offered as a confession," as said by the court in the recent and noted case of Bram v. United States, 168 U. S. 541, 18 Sup. Ct. Rep. 183, 42 L. ed. 568 "and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt and which by the very offer is vouched for as tending to that end, and on the other hand, for the purpose of avoiding the consequences of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." This quotation is pertinent to the case at bar. The

admissions made by the defendant were offered by the prosecution as tending to prove guilt. If they did not have that tendency, then they were inadmissible in evidence. But that they clearly did tend to prove guilt, and that they were only admissible as being in the nature of a confession, or as amounting to a partial confession, is evident.

Treating the statements of the defendant in question, then, as in the nature of a confession, we are next to inquire whether, in view of the manner in which they were obtained by the committing officer, they were obnoxious to the rule which obtains in such cases. This rule is well stated in 3 Russell on Crimes, sixth edition, 478, as follows: "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence; not obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force [110] of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted": See, also, 1 Greenleaf on Evidence, 16th ed., secs. 219, 220; Taylor on Evidence, 9th ed., sec. 872 et seq., 1 Bishop's Criminal Procedure, 3d ed., sec. 1217 et seq.; Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. Rep. 202, 28 L. ed. 262; Regina v. Baldy, 2 Den. C. C. 430.

We have come to the conclusion, after much consideration, that the statements or admissions made by the defendant were not freely and voluntarily made within the rule as thus stated, and hence were improperly allowed to go to the jury. It appears, from the cross-examination of the committing officer, Barney, that, previous to the making of most of said statement by the defendant, he had told her that the truth whatever that might be ought to be told; that it was always the best, except where it would be the means of conviction, and that even then he should prefer it if it were his case. He had also told her, during the latter part of the conversation, that it was thought she bought the revolver; that there was ample proof that she bought it, and that, having mentioned the place where she bought it, she might just as well say whether or not she bought it.

At the time when the statements in question were obtained from the defendant she was in the custody of this officer and

on the way to jail charged with the crime of murder. That she must have been in a high state of nervous excitement and mental distress, whether guilty or not guilty, and hence ready to catch at any gleam of hope whereby her situation might be bettered, goes without saying. The familiar saying that "Drowning men catch at straws," aptly illustrates the mental condition of one in her situation at that time. And we think it is not only possible but probable that, having stoutly and persistently asserted her innocence to the officer of the terrible crime charged against her, she was led to believe, by his persuasive and continued questioning, that it would not only do no harm but would, in some way, be better for her to admit the purchase of the pistol and the obtaining of the cartridges in question. In other words, the language used by the officer, taken as a whole (and taken in connection with the contradictory [111] statements made by the defendant about the purchase of the pistol), was such as to very naturally convey to the mind of the defendant the idea that she would gain some advantage by admitting that she bought the pistol and obtained the cartridges therefor. And hence it cannot be said that her admission relating thereto was voluntary.

We do not wish to be understood in what we have thus said, however, as deciding that a mere request, advice, or admonition to tell the truth will render a confession induced thereby inadmissible in evidence, for the strong current of authorities, as well as the better reason, is to be contrary: 6 Am. & Eng. Ency. of Law, 2d ed., p. 531, and cases cited; State v. Habib, 18 R. I. 558, 30 Atl. 462. Those decisions which have gone to the extent of so holding have certainly gone "to the verge of good sense, at least": Commonwealth v. Chance, 174 Mass. 249, 75 Am. St. Rep. 306, 54 N. E. 551. But where the request or admonition is given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession, the confession induced thereby will be inadmissible in evidence.

Nor do we wish to be understood as agreeing with counsel for the defendant in his contention that a confession made by a prisoner to the officer in whose custody he is, is not admissible in evidence, for such is not the law. On the contrary, a confession to the officer in charge of a prisoner, if voluntarily made, is just as admissible as if made to any other person, as ruled by the trial court in this case: See cases collected in 6 Am. & Eng. Ency. of Law, pp. 536, 539; Pierce v. United States, 160 U. S. 355, 16 Sup. Ct. Rep. 321, 40 L. ed. 454.

The next exception relied on by defendant is that which was taken to the admission of the testimony of Doctor Jay Perkins as to the result of certain experiments made by him in firing the revolver with which the deceased came to his death. Doctor Perkins was the medical examiner for Providence at the time, and had been such for six years previous. He had had large experience with gunshot wounds which were self-inflicted, and also with those which were not self-inflicted, and had made a special study of the nature and effects of such wounds, and of [112] the manner in which they were produced. In short, he was shown to be an expert in such matters.

The theory of the defense in this case was that the deceased committed suicide. The testimony of Doctor Allison was that the bullet wound was on the right temple, about one and one-fourth inches above the right ear; that the hair was singed above the bullet wound about one and one-half inches, also back of the ear a little, and that the beard of the deceased was singed to a point down below the angle of the mouth.

The autopsy showed that the course of the wound was downward and backward, and that the bullet lodged in the cerebellum. The proof shows that there was much greater burning of the hair beneath the wound, in the direction of the mouth, than above the wound; and it was claimed on the part of the prosecution that this was a material fact in determining the position in which the revolver was held when it was fired, the contention being that it was practically impossible for the deceased to have so held the revolver himself as to have caused the wound and the burning or singeing referred to. Doctor Perkins testified first, without objection (page 186 of the record), that he had made experiments with 32-caliber revolvers to ascertain the amount and character of burning which would be made by the discharge thereof. He then testified that he had made experiments with the particular 32-caliber revolver in question. To this testimony the defendant's counsel objected, on the ground that the experiments were ex parte, and hence should not be admitted, as the witness was not shown to have been an expert regularly appointed by the court. This objection was overruled, subject to exception.

The doctor then testified that if a pistol is held at any distance from the target the perforation made by the ball is not in the center of the burn, and that a greater part of the burn is on the side corresponding to the hammer of the revolver. He also testified that this is always so; that his own personal

observation of gunshot wounds, and all the best authorities, showed it to be the invariable rule that the greater part of the burn is always in the direction of the side in which the hammer of the revolver is held.

113 The contention of the prosecution in support of the admissibility of this evidence is that, having shown the existence of such a fact, it was competent to show that experiments made with the revolver in question produced similar results; while the contention of the defendant is that such evidence is in the nature of manufactured evidence, and hence inadmissible. We do not think the court erred in admitting the testimony in question. Had the experiments been made by a person not an expert in such matters, and had they been limited to the particular pistol which caused the injury, a very different question would arise. For, in such a case, the entire value of the testimony would depend upon the accuracy, skill, and honesty of a particular person regarding a particular and isolated transaction, with no opportunity on the part of the defendant to contradict it. But such is not the case here. The ex parte experiments, if such they may be called, which were made by Doctor Perkins, were not necessary in the establishment of the fact sought to be shown by the prosecution, as that existed independently thereof, as was fully shown in evidence. There was no occasion, therefore, to introduce the particular testimony objected to. But still we see no good reason why it was not admissible, as it tended to corroborate the position taken by the expert. And it is a well-settled rule that, whenever the opinion of a person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant: Stephens' Digest of Evidence, May's ed., 109; Hawkins v. Fall River, 119 Mass. 94; Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711. See State v. Justus, 11 Or. 178, 59 Am. Rep. 470, 8 Pac. 337, as to experiments made by nonprofessional witnesses.

If a chemist were called as a witness in a criminal case, and were asked the question whether a certain chemical always produces a certain result under given conditions, could it be properly objected that, because he had confirmed the result reached by him by experiments conducted alone in his laboratory with the particular chemical in question, such evidence should be excluded because the defendant was not present when the experiments were made? We think not. In such 114 a case the witness would be testifying as an expert, and it

would be competent for the defendant to contradict his conclusions if they were unscientific or incorrect; so that no harm could come to the defendant simply because he was not present or represented when the particular investigation in question was made.

In State v. Asbell, 57 Kan. 398, 46 Pac. 770, it was held that a witness experienced in the use of firearms might properly testify as to experiments like those here in question.

The case of Tesney v. State, 77 Ala. 33, cited by defendant's counsel in support of his objection to the testimony in question, is very different from the one before us. There, the witness did not show that he had had any experience in respect to the requisite proximity of a pistol, when discharged, to leave signs or indications of burned powder in the clothing. And the court said: "A person may be skillful and experienced in the use of firearms and have no observation or experience in respect to the particular matter inquired about. But the court erred in permitting evidence of the result of a solitary experiment of firing at a coat similar to the one worn by defendant, and the exhibition of the coat to the jury. Such evidence superinduces the mischief of trying a collateral controverted matter by proving separate and distinct experiments with results as variant as the manner of loading the pistols, and the modes of making the experiments, dependent more or less on the wishes and feeling of the person making them, and tends to confuse the jury and withdraw their minds from the consideration of the main issue. The witness, if an expert, may give his opinion, and detail generally the facts on which it is based, whereby the value of the opinion, and of the evidence on which it is founded, is submitted to the jury: McCreary v. Turk, 29 Ala. 244."

The cases of Forehand v. State, 51 Ark. 553, 11 S. W. 766, and Yates v. People, 38 Ill. 527, relied on by counsel for defendant, are not in point. The experiment in the former case was made by the jury, after they had retired to their room to consider upon their verdict, for the purpose of testing the truth of the defendant's statement. And it was held, and very 115 properly, that this was taking evidence out of court and in the defendant's absence, and such misconduct on the part of the jury as entitled the defendant to a new trial.

In the latter case the defense was that the deceased had come to his death by his own hand by shooting with a pistol, which was found near his person. On the trial, a pistol was

shown to the jury and identified as one which had been sold to the prisoner. But it was not proved to be the one that was found near the deceased, and by the agency of which he undoubtedly came to his death. After the retirement of the jury the pistol which had been shown to them on the trial was sent to them without the knowledge of the prisoner, his counsel, or the court, and they experimented with it for the purpose of judging whether, under the circumstances proven, the deceased could have shot himself with that weapon. The trial resulted in a verdict of guilty; and it was held that because the pistol, which had not been properly identified as the one by means of which the deceased was killed, was allowed to go to the jury without the prisoner's consent, a new trial should be granted.

Boyd v. State, 82 Tenn. 161, cited by defendant, not only fails to sustain the position taken by him, but, on the contrary, is a strong authority in support of the admissibility of the evidence in question. It was there held, in a very well-reasoned opinion, that experts may testify as to the results of experiments, made before and during the trial, based upon facts established by the evidence.

The theory of the defense in that case was that the deceased came to her death by her own hand, and there was evidence pro and con as to whether there were any powder stains on her clothing. The deceased was shot through the chest, the ball entering under the third rib on the left side, two and a half inches from the center of the breast bone, coming out at the eighth rib, and breaking that rib where it joins the back bone.

The court said: "As stated, the experts derived their knowledge, to some extent, from experiments made shortly before or perhaps, in part, during the progress of the trial. [116] A great deal of our knowledge is thus acquired, and it is recognized in every-day life as a legitimate source of knowledge. And it is upon this ground of experience or experiment that persons who have devoted their attention to particular branches of science or art may give their opinions, founded upon such experience and observation. So a surgeon was allowed to testify that a pistol must have been fired close to the body of the deceased, because there distinctly appeared marks of powder and burning on the wrist: Wharton on Homicide, sec. 677. . . . . The fact that the witnesses detailed the nature of experiments does not diminish the force of the opinions founded

upon them. If the experiments are such as to throw light upon the subject of inquiry, testimony as to them is not only admissible but very material. In most matters the opinion of the witness derives its value from the facts upon which it is founded, whether it be from observation, knowledge or experiment."

While we have no reported case in this state bearing upon the admissibility of testimony as to ex parte experiments like those brought in question in the case at bar, such testimony was admitted in the somewhat noted local case of State v. Congdon, a murder case, which was tried at great length at East Greenwich in 1883. The weapon used by the defendant was a pistol, and an important question at the trial was as to the nearness of the pistol to the deceased when the fatal shot was fired. Doctor William H. Palmer, of Providence, a well-known expert on gunshot wounds, was permitted to testify as to many experiments made by him, both before and after the homicide then in question, in order to determine at what distance from the muzzle of a pistol like the one used in that case powder burns or powder marks could be caused. Whether this testimony was objected to does not appear from the record of the case which has been preserved. But in view of the fact that the defendant was represented by such eminent counsel as Honorable Willard Sayles, for many years the able attorney general of this state, and Adoniram J. Cushing, Esq., and that no point was taken by them in the defendant's petition for a new trial (State v. Congdon, 14 R. I. 458) [117] that the testimony referred to was improperly admitted, it is fair to assume that such testimony had not theretofore been regarded as objectionable by the bar.

We therefore decide that the trial court did not err in admitting the testimony now in question.

We have carefully examined the other exceptions taken by defendant's counsel, but do not consider them to be tenable, or of sufficient importance to require special attention. As a new trial must be granted because of the error of the court in refusing to rule out the testimony first hereinbefore considered, after it appeared that the admissions in question were improperly obtained, there is no occasion for us to determine whether the verdict was against the evidence.

Petition for new trial granted.

A Confession made by a prisoner to an officer in whose custody he is can be received in evidence only when it was voluntary. The mere fact, however, that the prisoner is in custody does not invalidate his confession. But if it is obtained by any sort of threats or violence, or by any direct or implied promises, or by the exertion of any improper influence, it is inadmissible: State v. Storms, 113 Iowa, 385, 86 Am. St. Rep. 380; Bullock v. State, 65 N. J. L. 557, 86 Am. St. Rep. 668, and cases cited in the cross-reference note thereto.

Experiments and the results of experiments as evidence are discussed in Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243; Chicago etc. R. R. Co. v. Champion, 9 Ind. App. 510, 53 Am. St. Rep. 357, and note; Green v. Ashland Water Co., 101 Wis. 258, 70 Am. St. Rep. 911.

McCRILLIS v. COLE.

[25 R. I. 156, 55 Atl. 196.]

FIXTURES, Agreements, When may Control Question of.—As between themselves, landlord and tenant and vendor and vendee may say whether a thing shall be regarded as a fixture or not, but such an agreement cannot bind other parties having rights in the property. (p. 876.)

FIXTURES.—The Rule as to What are Fixtures is Substantially the Same Between Mortgagor and Mortgagee as between vendor and vendee. (p. 877.)

FIXTURES.—The Relation Between Parties Should be Deemed the Same as if They were Mortgagor and Mortgagee, when one has agreed to build a mill on land and to sell the land and mill to the other, and the latter has on his part agreed to supply certain machinery to be placed in and become a part of such mill, and the question arises between them whether such machinery shall be regarded as an irrevocable fixture. (p. 878.)

FIXTURES, What are.—Whatever is attached to the realty with a view of enhancing its value and for the purpose of being permanently used in connection with it is a fixture, and the fact that it can be removed without physical injury to the freehold does not change its character. (p. 879.)

FIXTURES, Seller of by Conditional Sale, When may not Reclaim.—One who sells machinery to be put in a mill, with a stipulation that such machinery shall remain his until paid for, cannot, after permitting it to be made a part of such mill, without any inquiry as to ownership, remove it as against one whose rights are substantially those of a mortgagee of the mill. (p. 880.)

FIXTURES.—With Respect to What are Fixtures as Between a Mortgagee and a Third Person Who Permitted Them to be Annexed to the Freehold as the result of a conditional sale by him to the mortgagor, it is not material whether the mortgage was executed before or after the annexation. (p. 880.)

Littlefield & Barrows, for the complainant.

Edwards & Angell, for the respondent.

157 STINESS, C. J. The complainant McCrillis entered into a contract by which he was to build a mill for Smith, and to sell to him the land and mill at an agreed price. Smith agreed to buy the land and mill within ten years, paying, after two years, five hundred dollars a year on account of the purchase price, and paying as rental, until the purchase was completed, interest on the price of the land and the money expended by the complainant in erecting the mill. Smith also agreed to furnish a part of the material for the mill and six hundred dollars in cash, labor or materials, without cost to McCrillis, and to furnish an engine and boiler, with shafting and pulleys, without cost to the complainant, "to be considered a part of the real estate." McCrillis built the mill, and Smith furnished the engine and placed it in the mill on a foundation built by McCrillis. Smith bought the engine of the respondent Cole, giving a receipt therefor stating that the engine was "borrowed and received" of Cole, "the same to remain the property of said John W. Cole until such time as the price set against them shall be paid as per memorandum in the margin, when they are to become the property of the borrower, E. E. Smith & Company." Smith was doing business under the above firm name.

Smith further agreed with Cole "in the meantime to keep property in good repair and sufficiently insured for the benefit of the said John W. Cole, and to permit him to enter and remove the same," if payment should not be made as agreed.

158 The agreement between Smith and McCrillis was unknown to Cole, and McCrillis was ignorant of the agreement between Smith and Cole. Smith became bankrupt, and, upon Cole's threat to take the engine, the complainant brings this bill for an injunction against its removal. The complainant claims that the engine became a part of the real estate, and that the respondent has no right to remove it.

This is the controlling question in the case. The complainant's first point is that by the agreement between him and Smith the engine was to be a fixture. Undoubtedly, as between themselves, landlord and tenant and vendor and vendee may say whether a thing shall be regarded as a fixture or not; but such an agreement cannot bind other parties having rights in the property. The effect of the agreement, therefore, between McCrillis and Smith is not controlling as to Cole who was not a party to it: Kaestner v. Day, 65 Ill. App. 623.

The question then is whether the agreement between Cole and Smith was such as to make the engine a fixture, so that

title passed to McCrillis when the engine was placed in the mill.

The complainant argues that he cannot be bound by a secret agreement between Smith and a third party, as it would work a fraud upon him. This depends upon the question whether the engine did or did not become a fixture as between the parties. If it did, the complainant holds it. If it did not, it was a chattel, and the rule of caveat emptor applies to the complainant if he is to be regarded as a purchaser under his agreement with Smith.

The general rule in regard to fixtures, as now established, was so fully considered by Mr. Justice Tillinghast in Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033, that it is needless to review it. The opinion in that case clearly pointed out the distinction in applying the rule between landlord and tenant and vendor and vendee, the former being broader and more liberal than the latter. Thus, he cited from McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12, as follows: "Many things which, as between landlord and tenant, [159] would be removable as chattels, are regarded as a part of the realty in favor of a mortgagee."

In this case the relation of the parties is not clear. McCrillis did not sell and Smith did not buy. They were not actually vendor and vendee. While Smith was to pay a rental, pending his agreement to buy, the sum he was to pay was interest on the price of the land and money expended in building, not a sum based on the rental value of the property. From this fact, coupled with the agreement to buy under which Smith entered, we are of opinion that they did not stand strictly in the relation of landlord and tenant. The obvious effect of the agreement between McCrillis and Smith, under which McCrillis was to advance his money, was that the contributions of Smith would be security to him for money he should expend in erecting the mill for Smith's benefit and on his agreement.

We therefore think that as to Smith he stood, equitably, as a mortgagee. The general rule between vendor and vendee is substantially the same between mortgagor and mortgage because the relation is substantially the same; the mortgagee, being a form of sale. A mortgagee gets a conditional instead of an absolute title, but it becomes absolute on default. In this case a mortgage was not given, but McCrillis held the title to the property conditionally, and, upon default, held it absolutely, without the need of a sale or deed.

As to the rule between vendor and vendee, it was said in Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033, quoting Field, J., in Sands v. Pfeiffer, 10 Cal. 264: "'As against him' (the vendor) 'all fixtures pass to his vendee, even though erected for the purpose of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance.' And the same strict rule which applies between heir and executor applies equally between vendor and vendee, and between mortgagor and mortgagee: 2 Kent's Commentaries, *345."

Under this relation of Smith and McCrillis there can be no question that if Smith had put in the engine, with clear title in himself, McCrillis would have taken it, by the agreement between them, upon Smith's default.

What effect, then, is to be given to Cole's claim of title, [160] under the circumstances? Has he title as against the complainant under an agreement in the nature of a mortgage?

Upon equitable grounds the complainant has the stronger position. Under his contract he retained the title to the land, giving Smith no apparent ownership, as security for his expenditure in building the mill, upon the chance that it might be left on his hands, the parties agreeing that the engine and boiler should be considered as real estate. He could have done no more. The agreement, as between him and Smith, was valid and reasonable. He was taking a large chance, for which he was entitled to adequate security.

Cole, on the other hand, was selling chattels of no use unless affixed to land, knowing the use to which they were to be put, without inquiry as to the ownership of the mill.

There is some conflict of testimony as to his knowledge, but it is not material. If he demanded, or was shown, any evidence of Smith's ownership of the mill, there could be none except the agreement, which showed at once that McCrillis was to hold the property as real estate. If he made no inquiry, then he knew that the engine and boilers were liable to be put into another's mill, where ownership was liable to be brought in question. He was intrusting Smith with possession and apparent ownership of that which was liable to become realty. If we ask which of two innocent persons must suffer loss, the answer is obvious that it must be the one more at fault; and these facts show that the defendant was at fault in not making an inquiry which it was his duty to make.

This is the underlying principle upon which decisions upon

this point rest, and we think that the law is settled on sound reason and a decided weight of authority.

In the first place we consider it settled in this state, by Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033, that whatever is attached to the realty with a view to enhance the value thereof, and for the purpose of being permanently used in connection therewith, is a fixture; and the fact that it can be removed without physical injury to the freeholder does not change its character.

In support of this rule, in addition to the cases there cited, [161] we refer to the following as a few of the many cases on this fruitful subject: Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310 (machinery other than that clearly portable); Smith Paper Co. v. Servin, 130 Mass. 511 (iron table on brick foundation); Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639 (boilers and engine); Snedeker v. Warring, 12 N. Y. (2 Kern) 170 (ornamental statue in grounds); Hopewell v. Taunton, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. 327, 6 L. R. A. 249 (machinery in a cotton-mill); Vail v. Weaver, 132 Pa. St. 363, 19 Am. St. Rep. 598, 19 Atl. 138 (engine and machinery of electric plant).

In the present case the intention of the contract was to make the engine and boilers a part of the realty. The question still remains, however, whether this affects the right of the respondent Cole, and was not a party to the contract in regard to the erection of the mill.

As to this question, in Davenport v. Shants, 43 Vt. 546, the rule is well stated in the syllabus and sustained by the opinion as follows: "When a person sells machinery under a condition that it shall remain the property of the vendor until the price is paid, but it is of such a character that when it is put in place in a mill it would pass under a mortgage of the real estate, and the vendor had reason to suppose it would be, and it was, so placed before it was paid for; held, that the equity of a subsequent mortgagee without notice of the vendor's claim and in reliance upon the vendee's title being absolute, is paramount to that of the conditional vendor."

This doctrine is sustained as to subsequent mortgagees or purchasers by the following cases: Wentworth v. Woods, 163 Mass. 28, 39 N. E. 414; Ridgeway v. Way, 141 Mass. 557, 6 N. E. 714; Southbridge v. Exeter, 127 Mass. 542; Meagher v. Hayes, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105; Kaestner v. Day, 65 Ill. App. 623; Fryatt v. The Sullivan Co.,

5 Hill (N. Y.), 116; affirmed, 7 Hill, 529; Thompson v. Smith, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789, 50 L. R. A. 780; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120, 10 N. W. 842; Water Co. v. Boiler Works, 15 Tex. Civ. App. 694, 41 S. W. 835; Brown v. Roland, 11 Tex. Civ. App. 648, 33 S. W. 273; Wickes v. Hill, 115 Mich. 333, 73 N. W. 375; McNally v. Connolly, 70 Cal. 3, 11 Pac. 320; Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; Knowlton v. Johnson, 37 Mich. 47; Muir v. Jones, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441; Wade v. Donau Brewing Co., 10 Wash. 285, 38 Pac. 1009; Case v. Garvin, 45 Ohio St. 289, 13 N. E. 493.

[162] The following cases apply the same rule to prior mortgagees and owners: Thompson v. Vinton, 121 Mass. 139; Hunt v. Bay State, 97 Mass. 279; English v. Foote, 8 Smedes & M. (16 Miss.) 444; Hinkley etc. Co. v. Black, 70 Me. 473, 35 Am. Rep. 346; Roddy v. Brick, 42 N. J. Eq. 218, 6 Atl. 806; Bass Foundry v. Gallentine, 99 Ind. 525; Hamilton v. Huntley, 78 Ind. 521, 41 Am. Rep. 593.

We do not regard a distinction between prior and subsequent mortgagees as important in this case. Both classes are recognized as being within the rule; and the fact that the mortgage was subsequent to the delivery of the property claimed in the cases cited was, no doubt, in some of them accidental. The language of some of the opinions indicates that the result would have been the same had the mortgages been prior to the conditional sale of the chattel. However this may be, it is clear that there is a stronger equity in favor of a bona fide purchaser, without notice, who is presumed to buy on the basis of what he sees and of what would be regarded to pass as real estate. He pays upon the condition of the property as it appears. To a prior mortgagee or owner in many cases it would simply be an accession.

In this case the complainant put out his money on the agreement by Smith to furnish the engine and boilers. His money was as much advanced upon the understanding that the engine and boilers were to be a part of the realty as one who should buy the realty as it stood.

Without reviewing all the cases cited by the respondent, it is enough to say that many of them are cases between landlord and tenant, and others are not in harmony with later decisions of the same court cited above; e. g., Lansing Works v. Walker, 91 Mich. 409, 30 Am. St. Rep. 488, 51 N. W. 1061; Penn Mut. Life Ins. Co. v. Semple, 38 N. J. Eq. 575; Hendy

v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; March v. McKoy, 56 Cal. 85; Godard v. Gould, 14 Barb. 662.

Other cases cited by respondent may be distinguished. In Brand v. McMahon, 38 N. Y. St. Rep. 576, 15 N. Y. Supp. 39, the claim of the vendor to the machinery was announced by the auctioneer at the sale of the realty.

In New Chester Waterworks Co. v. Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399, the appellant water company was composed of the members of a firm which [163] had bought the engines of the Holly company and then conveyed the land on which the engines were placed to the water company. On this fact the water company was charged with notice.

In other cases, the mortgagor or grantor having agreed that the property should be personalty, it has been held that his grantee was estopped to claim to the contrary; e. g., Smith v. Benson, 1 Hill, 176.

Our conclusion is that the complainant is entitled to hold the engine and boilers.

The Rules for Determining What are Fixtures are stated in Knickerbocker Trust Co. v. Penn Cordage Co., 66 N. J. Eq. 305, ante, p. 640, and cases cited in the cross-reference note thereto. The effect of agreements that fixtures shall retain their character of personal property is discussed in the monographic note to Fuller-Warren Co. v. Harter, 84 Am. St. Rep. 877-901. The effect of such agreements as against mortgagees of the realty is discussed on pages 888-893 of this note, and in the subsequent cases of Jennings v. Vahey, 183 Mass. 47, 97 Am. St. Rep. 409; Anderson v. Creamery Package Mfg. Co., 8 Idaho, 200, 101 Am. St. Rep. 188. And whether a chattel retains its character as such when sold on a condition that title shall remain in the vendor until the purchase price is paid, is discussed in Schellenberg v. Detroit Heating etc. Co., 130 Mich. 439, 97 Am. St. Rep. 489; Thompson v. Smith, 111 Iowa, 718, 82 Am. St. Rep. 541; monographic note to Fuller-Warren Co. v. Harter, 84 Am. St. Rep. 889.

SMITH v. UNION INSURANCE COMPANY.

[25 R. I. 260, 55 Atl. 715.]

INSURANCE—Want of Insurable Interest.—If the insured has not an insurable interest in the property, the policy is void from the beginning. (p. 884.)

INSURANCE.—The Assignment of a Policy of Insurance Covers Only Such Interest as the insured may have in the property at the time of the insurance and of the loss. The rights of the assignee cannot be more extensive than the rights of the assignor. (p. 885.)

INSURANCE.—The Right of a Mortgagee to Recover on a Policy of Insurance in Favor of His Mortgagor is dependent upon the inception and continuance of a valid contract of insurance between the insured and the insurer. (p. 885.)

INSURANCE in Favor of Mortgagee, Construction of Mortgage Clause—Want of Insurable Interest in the Mortgagor.—A policy of insurance providing that the loss, if any, shall be payable to S. as mortgagee as interest may appear, and that the insurance as to the interest of such mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner, nor by foreclosure or other proceedings or notice of sale relating to the property, nor by any change in its title or ownership, nor by the occupation of the property for a purpose more hazardous than permitted by the policy, contains two separate contracts of indemnity relating to the same subject but applying to different interests therein, and may be valid as to the interest of the mortgagee, though invalid as to the insured mortgagor, because he had no insurable interest in the property. (p. 888.)

INSURANCE.—It is not Necessary that the Premium be Paid by the Person Whose Interest is Insured. Hence, it is no defense to an action by a mortgagee suing on the mortgage clause contained in a policy that the mortgagor who paid the premium had no insurable interest, as the policy was at no time valid as to him. (p. 889.)

Tillinghast & Murdock, for the plaintiff.

Van Slyck & Mumford, for the defendants.

261 DOUGLAS, J. These cases are brought by the mortgagee of certain real estate, the buildings upon which have been destroyed by fire, to recover the amounts specified in three policies of insurance in the standard form, each containing the following clause:

"Loss or damage, if any, under this policy, shall be payable to Daniel Smith, as the mortgagee (or trustee), as interest may appear, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within

described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the property for purposes more hazardous than are permitted by this policy: Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of use thereof; otherwise this policy shall be null and void.

"This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee 262 (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right on like notice, to cancel this agreement.

[1] ("In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater portion of any loss or damage sustained, than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurance interest therein, whether as owner, mortgagee, or otherwise.)

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of

1 This paragraph occurs only in the policy issued by the Rochester German Insurance Company; not in the other two.

this mortgagee (or trustee) to recover the full amount of his claim."

The plaintiff held two mortgages on the property insured to secure notes made by a former owner of this property from whom it had come to Thomas Cullam, named as the insured in the policies. Before the taking out of the policies Cullam had conveyed the estate to his sister Melinda Paradie, as the declaration alleges, "without consideration," and she took out these policies in his name.

To the declaration in each case the defendants have demurred, alleging as grounds of demurrer:

1. It appears that, at the time of the issuing the policy in said declaration mentioned to one Thomas Cullam, said Thomas 263 Cullam had no insurable interest in the property claimed to have been insured by said policy.

2. It appears that said policy, it not being otherwise provided by agreement indorsed thereon or added thereto, was void: (a) Because the interest of the insured was other than unconditional and sole ownership; (b) because the subject of insurance was a building or group of buildings on ground not owned by the insured in fee simple.

3. There appears no consideration for the promise alleged to have been made by the defendant to the plaintiff.

4. It does not appear what was the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering the property described in the policy of insurance in said declaration mentioned.

The first three of these demurrers are substantial; the fourth does not affect the merits of the case, but may be obviated by amendment if necessary.

The first question raised is whether the interest of Thomas Cullam alone was insured; for if so, and he had no interest, nothing was insured; or, if he had no insurable interest, it was not in the interest which it was represented to be, and so was not insured, and the policy was void from the beginning.

The defendant contends that this is the effect of the policy in question; and the plaintiff, as mere assignee of the loss accruing to the insured, can recover nothing, as an insured person who has no interest can lose nothing. His reasoning is perfectly sound if his interpretation of the contract is correct. To this effect is the quotation from Judge Story in Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044, as follows: "It is clear both upon principle and

authority that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured and his alone, that is designed to be covered; and when he parts with his title to the property he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee [264] cannot be more extensive under the policy than the rights of the assignor; and as to the grantee of the property he can take nothing by the grant of the policy, since it is not in any just or legal sense attached to the property or an incident thereto."

And to the same effect are the words of Judge Harris, in Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391. He says: "The contract was made with McCarthy, the mortgagor; but the policy provides that in case of loss such loss shall be payable to the plaintiff. What is the legal effect of this provision? Without it the plaintiff could have no claim against the defendant for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive any money which might become due from the insurers by reason of any loss sustained by the mortgagor, or has it the effect to render the policy, which would otherwise be a contract to indemnify the mortgagor against loss, a contract to indemnify the mortgagee? : . . . . It seems to me to be very clear that it was the intention of all the parties that the interest of the mortgagor, and not that of the mortgagee, should be insured. It is stated in the policy that the property insured is the property of McCarthy, and that he is the person insured. McCarthy paid the premium. He made the contract. His interest as owner, and not that of the plaintiff as mortgagee, was the subject of the insurance. The plaintiff was merely the appointee of the party insured to receive the money which might become due him from the insurers upon the contract. The provision in the policy in this respect had no more effect upon the contract itself than it would if it had been provided that the loss for which the insurers should become liable should be deposited in a specified bank to the credit of the party insured."

Under such a contract the right of the mortgagee to recover is dependent upon the inception and continuance of a valid contract of insurance between the insured and the insurer: Sun Ins. Co. v. Greenville B. & L. Assn., 58 N. J. L. 367, 33 Atl. 962; Fitchburg Sav. Bank v. Amazon Ins. Co., 125 Mass. 431;

Foote v. Hartford Ins. Co., 119 Mass. 259; Smith v. Union Ins. Co., 120 Mass. 90; Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391; Carpenter [265] v. Providence-Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044; Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122; Franklin Inst. for Sav. v. Central Mut. Fire Ins. Co., 119 Mass. 240.

Taking these propositions as incontestable, the defendant argues that the new form of mortgage clause contained in this policy is nothing more than an amplification of the old form of the clause, whose effect was simply to change the payee of the loss, not to insure a different interest. He notices that the new clause saves the insurance as to the mortgagee from certain clauses of forfeiture which would otherwise bar the right of the insured, but he insists, notwithstanding, that the original contract is not initiated unless the party named as insured has an insurable interest to which it may attach.

We cannot read the clause in question without finding in it a much wider departure from the tenor of the old form of contract. It appears to us to contain two separate contracts of indemnity, relating to the same subject but applying to different interests therein. Before the adoption of this form a mortgagee might insure the property pledged to secure his debt on his own account. If the debt was paid he no longer had an insurable interest, and the insurance became void. If the property was destroyed by any risk insured against, the mortgagee received his insurance money if not more than his debt and gave no credit to the mortgagor therefor, but held his debt pro tanto for the insurer, or if it were fully paid assigned it to him.

Now all the elements of such a contract appear in this new form. Taken together with the rest of the policy, the company insure first Thomas Cullam for any loss which may come to him by reason of the destruction of the property described. This contract is subject to certain conditions appropriate to the relation of owner to the insurer. So long as this relation exists and these conditions are performed, the contract with Cullam is in force. If loss occurs while it is in force it is paid, by direction of the mortgage clause, to Smith to the amount of his mortgage, and the balance, if any, to Cullam; the amount paid to Smith extinguishes his mortgage debt fully or pro tanto. All this would have taken place under the old form of clause, and when the conditions are as supposed the new parts [266] of the clause have no application. When Cullam parts with or loses his interest, fails to pay premiums or violates the

conditions of the policy, the new provisions become effectual. These deal with the interest of the mortgagee. "This insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner," etc., is the language which meets the new condition of affairs; and the closing paragraph conclusively shows that the subsisting agreement which springs into life when the contract with the owner dies is the familiar one of insurance of a mortgagee's interest—an indemnity for loss of the security—in which the owner has no part and from which he can claim no benefit. The contract thenceforth is between the insurer and the mortgagee only, and the relation of the original insured to the property, and his acts or neglect concerning it, are of no account. And the two contracts combined in the policy and the mortgage clause are separable and independent from the beginning. When the first fails, or if it never attaches, the second begins and proceeds subject to its own conditions and limitations.

This construction has been adopted by all the courts whose decisions on the subject have been brought to our attention. In Hastings v. Westchester Ins. Co., 73 N. Y. 141, Miller, J., says: "The legal effect of the mortgage clause was that the defendant agreed that in case of loss it would pay the money directly to the mortgagees; and they were thus recognized as a distinct party in interest. It created a new contract from that time with the mortgagees, the terms of which most clearly indicate that it had no relation to the application of the condition referred to. The insurance had been to the owner, and the additional provisions which were incorporated in the policy by the mortgage clause, created a distinct contract with the mortgagees. It was an independent agreement partaking in no sense of the character of an assignment of a policy of insurance, but one in which the mortgagees were recognized as a separate party, having distinct rights, and entitled to receive the full amount of insurance money, without any regard whatever to the owner of the property."

267 Judge Rapallo, concurring, says, page 153: "I think that the intent of this clause was that in case by reason of any act of the mortgagors or owners, the company should have a defense against any claim on their part for a loss, the policy should, nevertheless, protect the interest of the mortgagees and operate as an independent insurance of that interest, and indemnify them against loss resulting from fire without regard to the rights of the mortgagor under the policy; and that to

effectuate that intention we should hold that, as against the mortgagees the defendant cannot set up any defense based upon any act or neglect of the mortgagors, whether committed before or after the issuing of the policy, or the making of the agreement between the company and the mortgagees."

In Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439, the court quote with approval the language of Judge Miller in Hastings v. Westchester Ins. Co., 73 N. Y. 141, and add: "If this be the effect of adding a mortgage clause like that before us after a policy is issued, we are unable to perceive any ground upon which it can be said to have a different effect if made contemporaneously with and as a part of the policy." And on page 456: "In effect there are two distinct contracts of insurance—one by the mortgagor; the other by the mortgagee—and this view gives full force to all the language and none other will."

In Eddy v. London Assur. Corp., 143 N. Y. 311, 322, 38 N. E. 307, 309, 25 L. R. A. 686, Peckham, J., says: "The fact of the mortgage clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company free from the conditions imposed upon the owners." The words of the mortgage clause considered in this case were slightly different from those considered in Hastings v. Westchester Ins. Co., 73 N. Y. 141, and neither of these clauses was exactly like the one we are concerned with; but all of them are alike in the material characteristics which affect the question before us.

The decisions of the New York court, which excused the mortgagee in case of loss from scaling his policy pro rata with other insurance held by the owner on the same property, no doubt occasioned the insertion of the paragraph on that subject contained in the form used by one of the defendants as above quoted.

In Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774, the person named as owner in the policy had conveyed his title before the policy was issued, exactly as in the case at bar; but it was held that the contract with mortgagee was valid under the principles of the cases cited.

These considerations dispose of the first and second demurrers.

The third must likewise be overruled.

In Massachusetts, where it is held strictly "that no one can sue or be sued on a simple contract who is not a party to it, disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move from the promisee to the promisor in the ordinary sense of those words." Palmer Savings Bank v. Insurance Co. of North America, 166 Mass. 189, 195, 196, 55 Am. St. Rep. 387, 44 N. E. 211, 32 L. R. A. 615, where it was held that upon this form of policy the mortgagee might sue in his own name. Here the premium was paid by the owner or on his behalf, but the insurance company received it as consideration for its double undertaking to the owner and to the mortgagee. The decisions of our own court are ample to support an action on this contract in the name of the mortgagee: Brown v. Roger Williams Ins. Co., 5 R. I. 395; Urquhart v. Brayton, 12 R. I. 169; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427; Adams v. Union R. R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273; Kehoe v. Patton, 23 R. I. 360, 50 Atl. 655.

If the original contract is with the owner, and it is assigned to the mortgagee with the consent of the company, the process may be considered as a novation; but it is not necessary to rely upon any supposed change of relation where the original undertaking is solely for the benefit of the mortgagee and the promise is made directly to him.

In this case the owner pays the premium on account of the mortgagee and in fulfillment of his duty to do so, and the promise thereon is directly made by the company to the mortgagee himself.

269 Substantial demurrers overruled, and cases remanded to the common pleas division for further proceedings.

A Policy of Insurance providing that if it shall be made payable to a mortgagee of the property, no act or default of any person except such mortgagee, his agents, or those claiming under him, shall affect the right of the mortgagee to recover in case of loss, which shall be payable to the mortgagee as his interest may appear, gives the latter independent insurance which cannot be destroyed by any act or default of the mortgagor, or of any person except the mortgagee, his agent, or privies: Magoun v. Fireman's Fund Ins. Co., 86 Minn. 486, 91 Am. St. Rep. 370. See, too, Christenson v. Fidelity Ins. Co., 117 Iowa, 77, 94 Am. St. Rep. 286; Whiting v. Burkhardt, 178 Mass. 535, 86 Am. St. Rep. 503; Lancashire Ins. Co. v. Boardman, 58 Kan. 339, 62 Am. St. Rep. 621; Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 58 Am. St. Rep. 663, and note.

MUNICIPAL COURT v. WHALEY.

[25 R. I. 289, 55 Atl. 750.]

A JOINT AND SEVERAL BOND Given by Two or More Principals has the Same Effect as if all had given a joint and each had given a separate bond. (p. 890.)

ONE EXECUTOR IS NOT LIABLE as Such for Waste Committed by a Coexecutor, nor for assets which the latter received and misapplied without the knowledge or consent of the former. (p. 891.)

EXECUTORS AND COEXECUTORS.—One executor, on an accounting, is not held by the acts of another in which he has not participated and as to which he has not been negligent. (p. 894.)

ONE EXECUTOR MAY SUE ANOTHER and Their Sureties where both executors have given a joint and several bond with the same sureties and, as to the executor sued, there has been a breach of the condition of the bond and the executor suing is a legatee and as such beneficially interested in the recovery. It is no objection that he is thus permitted to sue his own sureties. (p. 894.)

Irving Champlin, for the plaintiff.

Edwards & Angell, for the defendants.

890 STINESS, C. J. The ground of the demurrer to the declaration is that Joseph W. Smith, for whose benefit the action is brought, was a coprincipal with Henry W. Smith on the bond in suit, and a coexecutor with said Henry W. Smith on the estate of Sheffield Smith; that said action is, therefore, by one of the principals on a bond, against the sureties thereon, to recover from said sureties for the default of his coprincipal, and is not maintainable. The bond is joint and several.

Public Statutes caption 184, section 10, in force at the time this bond was given, provided: "Every executor . . . . shall give bond," etc. Under such a provision we understand that it has been customary, when so desired, as it would be allowable, for several executors to give separate bonds. In most cases, however, the custom has been, as in this case, for joint executors to give joint and several bonds.

"On a joint bond all the obligors must be sued; but on a joint and several bond a creditor may sue all jointly or one separately, for the whole amount. It is the same as though all had given a joint bond and each a separate bond, and the creditor could elect on which bond he would sue": Bouvier's Law Dictionary, tit. "Joint and Several"; 2 Woerner's American Law of Administration, 2d ed., sec. 258; 3 Williams on

Executors, Am. ed., R. and T., 243; 3 Redfield on Wills, 2d ed., p. 282.

The defendant claims that Joseph W. Smith, being a principal, cannot sue the representatives of a coprincipal or a surety; because he himself is liable, and he would thus be suing for his own default.

As stated by Woerner, supra, an executor was not required by common law to give bond, and was not liable for the malfeasance of a coexecutor unless he had concurred in it, or there had been a joint possession of the estate from which it could be inferred that one had yielded to the control of another who had squandered the property. Except as it may [291] be modified by the statute, the rule in this country is the same—that one executor is not liable, as such, for waste committed by his coexecutor, nor for assets which the latter received and misapplied without the knowledge and consent of the former. By force of modern statutes, however, this rule now applies, practically, to liabilities of coexecutors as between themselves or on accounting, since the requirement of a bond protects legatees and creditors. There can be no question that on a joint bond all executors would be jointly liable, for that is the condition of the bond. The question, therefore, comes upon the distinction between a joint and a joint and several bond.

Having said that upon a joint bond there would be an obvious joint liability, it follows that if there is only the same liability on a joint and several bond there is no difference between the two. Yet there is a well-recognized distinction between them, such as we have already pointed out. If, then, by reason of the several obligation one may be used alone, it follows that either party may sue the other in a distinct right. As several bonds, the sureties are sureties severally of each executor, as they might be on separate bonds. Only in this way can effect be given to the provision of severalty in the bonds.

Most of the cases relied on by the defendant are distinguishable from the case at bar. Jeffries v. Lawson, 39 Miss. 791, Jamison v. Lillard, 80 Tenn. 698, Brazer v. Clark, 5 Pick. 96; Boyd v. Boyd, 1 Watts, 365, Clarke v. State, 6 Gill & J. 288, 26 Am. Dec. 576, Ames v. Armstrong, 106 Mass. 15, and Sparhawk v. Buell, 9 Vt. 41, are frequently cited to show the joint liability of coexecutors, but they are all suits of legatees or creditors, who without question can hold them jointly on a joint and several bond.

The real plaintiff in the case at bar is a legatee, but the question is not whether he could sue if he were that and nothing more, but whether, though he is a legatee, he can sue, being also a coexecutor.

Aside from the cases of creditors and legatees cited by the defendants, in which courts have spoken of the joint liability [292] of coexecutors under joint and several bonds, and others which are distinguishable on other grounds, we find but two which seem to support the contention that in no event can one executor sue his coexecutor.

In Stephens v. Taylor, 62 Ala. 269, the court held that two or more executors entering into a joint and several bond for the faithful performance of their duties are liable for the acts and defaults of each other, unless the bond shows that they did not intend to become bond for each other's defaults; that the sureties to such a bond become responsible to claimants for the faithful administration of the estate by their principals, the executors, and each of them; and the principals, and each of them, come under obligation to hold the sureties harmless against any default on the part of the principals; that there are the duties toward one another that spring out of the relation created by the bond.

This states very plainly the position taken by the defendants in this case.

The same rule is held in Hoell v. Blanchard, 4 Desaus. (S. C.) 21, with the addition that a coadministrator cannot hold a surety for default by another administrator, though claiming in a different right; exactly the case before us. The reasoning of the court is that the relation between a principal and surety is very different from the relation between a surety and creditors; that a principal is bound to stand between his surety and the surety's responsibility in that character.

It is to be noted, however, that the bond appears to have been joint, and not joint and several, as in Stephens v. Taylor, 62 Ala. 269. As a joint bond we think there can be no doubt as to the doctrine of Hoell v. Blanchard, but it does not reach the point of this case.

Towne v. Ammidown, 20 Pick. 535, was a bill by a surety on a joint and several bond, for indemnity from the heirs of a deceased coexecutor who had been guilty of no default. Obviously, it was held that the heirs were not liable.

In Nanz v. Oakley, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223, a suit was brought on a joint and several bond in which

an administratrix had [293] joined with a coadministrator. The latter had the entire management of the estate, and had converted to his own use about four thousand dollars belonging to the estate. The administratrix was also the sole heir and next of kin of the intestate. Upon her death her coadministrator was charged by the surrogate with the amount, and ordered to pay it over to her administrator. Suit was brought against the coadministrator and execution returned unsatisfied, whereupon the action was brought against the surety on the original bond by the administrator of the coadministratrix and heir. The court held that he was entitled to recover. Numerous authorities are reviewed by the court, and the underlying reasons upon which the decision is based are that the purpose of a bond is to insure the discharge of the duty reposed in the persons appointed; that it was not intended to change the liability or relation of the persons appointed from that which existed independently of the bond; and that joint administrators are liable for joint acts and severally liable for their own acts.

The same rule has been applied to joint and several notes. In Beecham v. Smith, El. B. & E. 442, it was held that a maker of a joint and several note who was one of the payees could sue a comaker on his several promise. Lord Campbell, C. J., said: "The contract sued upon is the several contract of the defendant; and the fact that there is also upon the same instrument a joint contract by the three makers is no defense." Coleridge, J., said: "Practically there are three promissory notes signed by three different parties; and the note declared on is not that signed by the plaintiff, but that signed by the defendant." To the same effect is Faulkner v. Faulkner, 73 Mo. 327.

In State v. Wyant, 67 Ind. 25, where the statute required separate bonds, but the administrators executed a joint and several bond, the court construed it as separate bonds and sustained a suit by one against the other administrator and sureties. While the case is largely controlled by statute, it is nevertheless in point upon the question whether an administrator can sue his coadministrator on his several obligation. [294] In Pringle v. Pringle, 130 Pa. St. 565, 18 Atl. 1024, an executor was allowed to sue, as an individual, his coexecutor, who had received all the assets, for a debt due from the testator to him. It was not a suit on a bond, but it is in point to show that an executor is not, by virtue of his office, debarred of a personal right.

It is the general rule that one executor, on accounting, is not held by the acts of another, in which he has not participated or as to which he has not been negligent: McKim v. Aulbach, 130 Mass. 481, 39 Am. Rep. 470; Wilson's Appeal, 115 Pa. St. 95, 9 Atl. 473; Paulding v. Sharkey, 88 N. Y. 432; In re Adams, 51 App. Div. 619, 64 N. Y. Supp. 591; Hall v. Carter, 8 Ga. 388; Ormiston v. Olcott, 84 N. Y. 339; Sparhawk v. Buell, 9 Vt. 41 (by Redfield); Gaultney v. Nolan, 33 Miss. 569.

If the joint executors are not liable for the devastavit of each other, we see no satisfactory reason why one should not be entitled to sue for his separate and personal claim.

The defendants urge as a reason that the plaintiff is thereby suing his own sureties, whom the law regards with peculiar tenderness. It is true that sureties are, and should be protected as far as possible, and that a principal cannot sue his sureties for his own default. But if a several bond is equivalent to a separate bond, it follows that in a separate suit the sureties are those of the coexecutor pro hac vice, and that they are not sued by the plaintiff as his sureties or for his default. If, also, bonds are to secure the beneficiaries of an estate, there is no just reason why the interest of a beneficiary, who happens to be an executor, should not be protected, as well as others, from acts for which he is not chargeable. It is said that he should not be able to sue, because, being a coexecutor, he has the duty and opportunity to know what is done, which a mere creditor or other beneficiary does not have. There is force in this argument, and a court should hold an executor to clear proof of diligence and good faith on his part. Still, two executors cannot always have possession of money at the same time. Sickness, absence, or other causes may prevent one from having constant oversight; and in such a case it would be hard law, as [295] between the two, to deny a remedy to the innocent against the guilty. We fail to see why the beneficiary may not sue the executor in default, although, by virtue of the bond, both might be sued by a creditor or legatee. Thus, the relation of executors is preserved between themselves and as to creditors; due effect is given to the form and obligation of the bond; only the one in default is held to answer, and the rights of all beneficiaries are protected.

We think that this result is best sustained in reason and authority.

The demurrer to the declaration is overruled.

The Liability of Sureties on the Bonds of Executors and administrators is discussed generally in the note to Commonwealth v. Stub, 51 Am. Dec. 519-536. An executor is not ordinarily liable for the misconduct of his coexecutor in which he has not participated, and in respect to which he has not been negligent: See the note to Jones' Appeal, 42 Am. Dec. 291. It is held in Clarke v. State, 6 Gill & J. 288, 26 Am. Dec. 576, that joint administrators are responsible, jointly and severally, each for his own act and also for the acts of each other. To avoid this responsibility for each other, they should execute several bonds. See, in this connection, Insley v. Shire, 54 Kan. 793, 45 Am. St. Rep. 308; Peterson v. Vanderburgh, 77 Minn. 218, 77 Am. St. Rep. 671.

FIELD v. CONSOLIDATED MINERAL WATER COMPANY.

[25 R. I. 319, 55 Atl. 757.]

MECHANIC'S LIEN in Favor of Architect.—An architect who prepares plans and specifications for, and supervises and directs the construction of, a building and fixtures therein, is entitled to a lien thereon under a statute declaring that whenever any building shall be constructed, it, together with the land, is made liable and shall stand pledged for all work done in the construction, erection or reparation of such building. (pp. 896, 897.)

R. E. Lyman, for the petitioner.

Barney & Lee and Van Slyck & Mumford, for the respondents.

319 DOUGLAS, J. The petitioners, as architects, prepared plans and specifications for, and supervised and directed, the construction of certain buildings and fixtures therein for the respondents, and claim therefor the lien provided for in chapter 206 of the General Laws.

The parts of the statute which are material upon the question presented read as follows: "Section 1. Whenever any building . . . . shall be constructed . . . . such building . . . . together with the land . . . . is hereby made liable and shall stand pledged for all the work done in the construction, erection or reparation of such building . . . . and for the materials used in the construction, erection, or reparation thereof which have been furnished by any person," etc.

The great weight of authority, under substantially similar statutes, gives the lien to supervising architects both for the labor of supervision and the labor of preparing plans: Knight v. Norris, 13 Minn. 473; Gardner v. Leck, 52 Minn. 522, 54

N. W. 746; Wanganstein v. Jones, 61 Minn. 262, 63 N. W. 717; Von Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800; Phoenix Furniture Co. v. Put-in-Bay [320] Hotel Co., 66 Fed. 683; Mulligan v. Mulligan, 18 La. Ann. 20; Mutual Benefit L. Ins. Co. v. Rowand, 26 N. J. Eq. 389; Arnoldi v. Gouin, 22 Grant U. C. 314; Johnson v. McClure, 10 N. Mex. 506, 62 Pac. 983, where the cases are reviewed; Stryker v. Cassidy, 76 N. Y. 50, 53, 32 Am. Rep. 262.

In Pennsylvania an architect employed to make plans and supervise the construction in accordance therewith is entitled to a lien (Bank of Pennsylvania v. Gries, 35 Pa. St. 423); but one who furnishes plans alone and does not supervise is not entitled: Price v. Kirk, 90 Pa. St. 47; Rush v. Able, 90 Pa. St. 153.

In Nebraska a lien is given for merely furnishing plans: Henry & Coatsworth Co. v. Halter, 58 Neb. 685, 79 N. W. 616, 619.

In Iowa it has been held that an architect has no lien for furnishing plans if they are not used: Foster & Libbie v. Tierney, 91 Iowa 253, 51 Am. St. Rep. 343, 59 N. W. 56.

In Illinois and Ohio it is doubted whether the lien will apply for plans if there is no supervision: Taylor v. Gilsdorff, 74 Ill. 354; Phenix etc. v. Hotel Co., 66 Fed. 683.

In Mitchell v. Packard, 168 Mass. 467, 60 Am. St. Rep. 404, 47 N. E. 113, the court allowed an architect for the labor of supervising, but not for the labor of preparing the plans. The Massachusetts statute allows the lien for "labor performed or furnished . . . . and actually used in the erection," etc. We think this construction stricter than the spirit of our statute requires. The statute is intended to afford a liberal remedy to all who have contributed labor or material toward adding to the value of the property to which the lien attaches: Parker v. Bell, 7 Gray, 432. The plans of the architect are written directions to the workmen, and contribute to the building as much as the verbal directions of the overseer. Indeed, the main task of the superintendent is to enforce compliance with the working plans. If the same plans may be preserved and used again elsewhere, so may the scaffolding which supports the builder at his work; but no one could doubt that the work of putting together such temporary adjuncts to the permanent structure should entitle the builder to his lien therefor. In a case like the present, where the architect draws the plans and uses them as his tools in the supervision [321] of the work, we think he is

entitled to a lien for the labor expended both in the drawing and the supervision. While the title of the statute reminds us that it was primarily intended to secure the mechanic only, its terms now include the materialman, who does no work, and the drawing of plans is both mental and manual work.

That an Architect may be entitled to a mechanic's lien, see Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 824, and cases cited in the cross-reference note thereto. Compare, however, Thompson v. Baxter, 92 Tenn. 305, 36 Am. St. Rep. 85.

EDDY v. UNION RAILROAD COMPANY.

[25 R. I. 451, 56 Atl. 677.]

ANIMALS, Owner, When not Liable for Injuries Inflicted by. If a domestic animal is rightfully in the place where it inflicts an injury, as where a horse, being led along a public street, by kicking, injures a person lawfully there and in the exercise of due care, the owner is not liable, in the absence of negligence on his part or knowledge of any vicious propensity in the animal. (p. 899.)

Page, Page & Cushing, for the plaintiff.

David S. Baxter and Lewis A. Waterman, for the defendant.

452 JOHNSON, J. The plaintiff was riding in a buggy along Broad street, in the city of Providence, on the right-hand side of the street, near the curb. At the same time a servant of defendant, in charge of two horses, riding one and leading the other by a halter, was proceeding in the same direction, near the middle of said street. When the plaintiff drove alongside the horses, the led horse suddenly wheeled and kicked the buggy, throwing the plaintiff out and injuring him. At the conclusion of the testimony for the plaintiff, a verdict for the defendant was directed by the presiding justice. The evidence shows that the plaintiff was in the exercise of due care. The question is whether the defendant was negligent.

In Hammack v. White, 11 Com. B., N. S., 588, the defendant was riding a horse which he had recently bought and had taken out to try. From some unexplained cause the horse became restive; and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man. It was held that these facts disclosed no evidence of negligence which the judge was warranted in submitting to a jury. But the court expressly rested that result on the fact

that the defendant had used his utmost efforts to prevent the animal from getting on the pavement.

Commenting on that case and the cases of Cox v. Burbridge, 13 Com. B., N. S., 430, Lee v. Riley, 18 Com. B., N. S., 722, and Ellis v. Loftus Iron Co., L. R. 10 C. P. 10, Mr. Bevan uses this language: "Although when a horse is in a place where 453 it has a right to be, any disposition to kick that it may suddenly manifest does not import a liability on its owner; when the horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses, that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given": 1 Bevan on Negligence, 2d ed., 97.

The same principle is stated in 2 American and English Encyclopedia of Law, second edition, 364, as follows: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animals; and in an action for such injuries, knowledge on the part of the owner must be alleged and proved."

In Healey v. Ballentine, 66 N. J. L. 339, 49 Atl. 511, where the plaintiff was kicked by a horse which was being led along on the sidewalk, it was held that proof of knowledge, on the part of the owner, of a vicious propensity of the horse was not necessary, solely on the ground that the horse was not rightfully in the place where it inflicted the injury.

In Fallon v. O'Brien, 12 R. I. 518, 34 Am. Rep. 713, where a horse had escaped from an inclosure and while in the street kicked the plaintiff, this court, after reviewing the cases, page 520, says: "In the American cases cited, it seems to be recognized that it is the negligence of the owner of the animal straying in the highway which renders him liable for the injury inflicted by it; and that if he is guilty of no negligence he is subject to no liability": See Goodman v. Day, 15 Pa. St. 188, 53 Am. Dec. 589, and Dickson v. McCoy, 39 N. Y. 400, there cited.

The decision of the question whether a domestic animal is or is not rightfully in the place where it inflicts the injury complained of is determinative as to the necessity of proof of knowledge, on the part of the owner, of a vicious propensity of the animal.

The leading of horses in the street is an every-day occurrence. It is the common practice of ordinarily careful and

prudent men. The horse, being in charge of an attendant and [454] led by a halter, was rightfully in the street. There was no evidence that he had ever before showed any vicious propensity or been known to kick.

Under such circumstances the defendant, in the absence of testimony showing negligence in management of the horse while in the street, would not be liable. The verdict for the defendant was, therefore, rightly directed.

Petition for new trial denied, and case remanded to the common pleas division with direction to enter judgment on the verdict.

The Owner of a Domestic Animal **is not in general liable for an injury committed by it while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such propensity. If, however, the owner knew of the vicious propensity, he must restrain it at his peril, and is answerable for injuries inflicted by it: Morgan v. Hudnell, 52 Ohio St. 552, 49 Am. St. Rep. 741; Clowdis v. Fresno Flume etc. Co., 118 Cal. 315, 62 Am. St. Rep. 238; Crowley v. Groonell, 73 Vt. 45, 87 Am. St. Rep. 690; Lynch v. Kineth, 36 Wash. 368, 104 Am. St. Rep. 958; note to Parsons v. Mauser, 97 Am. St. Rep. 287, 288. As to the liability of the owner of a horse which bites or kicks a person in a public street, see Reed v. Southern Express Co., 95 Ga. 108, 51 Am. St. Rep. 62; Hardiman v. Wholley, 172 Mass. 111, 70 Am. St. Rep. 292.**

L'UNION ST. JEAN BAPTISTE DE PAWTUCKET v. OSTIGUY.

[25 R. I. 478, 56 Atl. 681.]

A BENEFICIAL ASSOCIATION cannot Recover Dues for the Nonpayment of Which a Member has been Expelled. (p. 900.)

BENEFICIAL ASSOCIATIONS.—Assessments in a Beneficial Association are not Debts Recoverable at Law, if its by-laws provide that dues and assessments are payable in advance, and that persons in default cease to be members. (p. 903.)

Hugh J. Carroll, for the plaintiff.

Thomas Riley, Jr., for the defendant.

[478] STINESS, C. J. The plaintiff, an incorporated beneficial society, whose members are subject to monthly dues, brings his action to recover dues, for nonpayment of which the defendant has been stricken from the rolls of the society.

The defendant pleaded the fact that he had been removed from the rolls, whereby the plaintiff had exhausted its remedy, and to this plea the plaintiff demurs. The district court of the tenth judicial district sustained the demurrer, and [479] the defendant brings the case here on exceptions to that decision.

The simple question is whether a society can sue a member for dues after having expelled him for nonpayment.

We think the question must be answered in the negative.

As a general rule, when a penalty is enforced for the default it is a waiver of other remedies for the same default under the contract. The plaintiff claims, however, that the collection of past dues is a right of the society, which is unaffected by the penalty of expulsion.

An obvious reply to this position is that dues are paid for the benefits and privileges of membership. So long as a member pays them he is entitled, in this respect, to remain a member. The society, in its by-laws, elects to take the forfeiture of membership in lieu of unpaid dues, because, if it can collect the dues after the forfeiture the member would no longer be in default and the reason for expulsion would no longer remain, yet he would stand legally expelled. Recovery of such dues at law amounts to compelling a member to perform his part without giving him the benefits of membership.

Membership and liability for dues are correlative. One cannot stand without the other. It is a quasi contract. But if a contract provides for a payment of money, and in default thereof for the forfeiture of something else, an action, after forfeiture has been exacted, cannot be maintained for the money under the contract. A forfeiture which has been enforced amounts to a satisfaction of the contract.

Aside from these general considerations, there have been some decisions upon the question of a member's legal liability for assessments.

Nash v. Russell (1849), 5 Barb. 556, before beneficial societies were so numerous as now, held that a member was not liable at law for dues, nor for a note which he had given for them, because the note was not based upon a consideration of legal obligation, the payment being voluntary, or, at most, resting on moral obligation only. Since then, societies of this kind have been recognized as of the nature of insurance companies, [480] and in some cases membership is treated as a contract.

Ellerbe v. Barney, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435, held that a forfeiture clause did not discharge a member from past society debts or dues, his promise to pay the assessments, when called, being the consideration for his insurance as a member. It was a decision of four judges against three. The action was brought by the state superintendent of insurance, to recover assessments to pay the designated amount due on the death of a member. The superintendent had been appointed receiver of the society and sued, as such, to recover money from the members at the time to pay the claims against it. The insurance in that case was treated like insurance in a mutual company, where members are liable on all losses occurring during their membership in the company, though the membership may then have ceased. Provident Mut. Assn. v. Pelissier, 69 N. H. 606, 45 Atl. 562, followed Ellerbe v. Barney, 25 S. W. 384, 23 L. R. A. 435; McDonald v. Ross, 29 Hun, 87, was also an assessment for a death loss, which was treated as a mutual insurance contract. Palmetto Lodge v. Hubbell, 2 Strob. 457, 49 Am. Dec. 604, held that a member was liable for all dues after suspension, if the by-laws so provide. The court pointed out the distinction between a suspended and an expelled member. "According to the by-laws, a suspended member may be reinstated on paying the amount charged against him. An expelled member can be readmitted only on the terms and conditions of a new member." One under suspension was still a member and could be assessed.

Commonwealth v. Wetherbee, 105 Mass. 149, held that the issue and acceptance of a certificate, whereby the company agreed to pay a fixed sum on the death of a member, and the members also agreed to pay a fixed sum on their part to make up the amount payable on the certificate, was mutual insurance. The promises were mutual, and so also was the liability. The case, however, was an indictment for doing insurance business contrary to law.

On the other hand are cases which hold that an expelled [481] member is not liable for dues and assessments in a society of this kind.

Thus Lehman v. Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, recognized the insurance feature as equivalent to mutual insurance, but held that it was a unilateral contract, and whether the payment for insurance be termed a premium or an assessment, the right of the association or company is to declare a forfeiture and not to recover the assessment or premium in a suit.

In Chicago Assn. v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549, the court said: "While the certificate of membership is a contract, such contract, in the absence of express stipulations to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments or dues, or does any act forbidden by the certificate of membership, the certificate becomes void and the membership ceases. But the making of an assessment or the maturing of dues does not make the member a debtor to the association so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion."

To the same effect is In re Protection Co., 9 Biss. 188, Fed. Cas. No. 11,444. See, also, 2 May on Insurance, 3d ed., sec. 341a. This is the accepted rule in ordinary life insurance. The insured pays his premium when he takes his policy, and it is optional with him to continue or not when it expires. No company would consider that it had a right to sue for a premium after forfeiture. No wrong is done under this rule. Premiums are payable in advance; and thus the insured pays for his insurance while he has it; and then he drops it. The conditions of the society in this case are not substantially different. Dues and assessments are payable in advance. When a member ceases to pay he has already paid for all the time for which he has had benefit. The defaulted payment is for future benefits which he does not choose to continue. This is right and proper, and in strict analogy to other insurance. Where insurance has been procured for a fixed sum, upon mutual promises to make up the amount, there is a much more distinct contract [482] and a clearer reason for holding one liable under it than in the present case. Here the contract is that the beneficiary shall receive from the society, in case of a death, as many dollars as there are members. The number of members is liable to vary, and the member is presumed to take notice that under the by-laws those in default will cease to be members. The payment is postponed thirty days, and the members have the same time within which to pay their assessments. The postponement of payment to the beneficiary is not for the purposes of collecting the money, because, assessments being in advance, the fund is already in hand at the time of the member's death, and the assessment thereupon becoming due is for the next death that may take place. It would seem, therefore,

as if the reason for delay might be to ascertain the number of members who are in good standing at the time, as the basis on which the payment is to be made. However this may be, it shows a difference between the ordinary contract of mutual insurance to pay proportionally for all losses during membership, and advance payments upon which membership is to depend.

Another difference between a society of this kind and insurance companies proper is that benefit societies usually give a term of grace, as in this case, of thirty days, within which payment can be made; while other companies, formerly at least, required payment on the anniversary of the date of the policy. The object of this term of grace, however, is, apparently, to enable the member to avoid expulsion, and not a provision to affect the contract; for he is in default at the expiration of the time originally fixed for payment in the by-laws, and under them he is not entitled to benefits or to the mutual aid fund while so in default. He therefore does not have benefits after default, which otherwise might be regarded as a consideration for liability for dues: See art. 24, sec. 2; art. 27, sec. 10; art. 30; art 31, sec. 3; art. 33, sec. 2; art. 33. A term of grace accorded by a society cannot make that a debt which is not a debt, nor create an equitable liability of one member by a provision which is made for its own benefit or for the accommodation of all its members. It amounts to an extension [482] of the time of payment within which a member may reinstate himself.

We think that under the by-laws in this case assessments are not debts recoverable at law.

The exception to the ruling of the district court sustaining the plaintiff's demurrer to the defendant's plea is sustained.

Features of the Law Specially Applicable to mutual benefit societies are discussed in the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 543-578. It is held in Palmetto Lodge v. Hubbell, 2 Strob. 457, 49 Am. Dec. 604, that a suspended member of an Odd Fellows' lodge is liable for all dues accruing after his suspension, if the by-laws so provide and are reasonable, and an action lies for their recovery.

GLADDING v. SAINT MATTHEW'S CHURCH.

[25 R. I. 628, 57 Atl. 860.]

WILLS—Bequests to Corporations Which Cease to Exist During the Life of the Testator.—Unless a legatee is in being at the death of the testator, the legacy cannot vest. This rule applies to corporate legatees as well as to natural persons. (p. 908.)

BY THE CONSOLIDATION of Two Corporations a new corporation is formed and the old corporation ceases to exist. (p. 909.)

WILLS—Bequest to a Corporation Which Ceases to Exist Through Its Consolidation with Another.—If a will purports to make a bequest to a designated corporation, which, during the lifetime of the testator, ceases to exist through its consolidation with another corporation, the latter takes nothing by the bequest, though it was made for a specified purpose carried on by the old and also by the consolidated corporation. (p. 911.)

WILLS.—A Codicil does not by Its Republishing Operate to revive a devise or bequest, the object of which died in the testator's lifetime. (p. 911.)

CHARITIES, What are.—A Christian Church lawfully existing is a charity in the sense of the statute of 43 Elizabeth, chapter 6. (p. 911.)

LEGACIES, Lapse of.—Gifts to Charitable Institutions may Lapse, as well as gifts to natural persons. (p. 911.)

CY PRES, Doctrine of, When not Applicable.—If a devise and bequest are made to St. Ann's Church for Deaf Mutes in the city of New York, to which the testatrix belongs, and in which she takes a great interest, and which in her lifetime ceases to exist through its consolidation with another corporation, the doctrine of cy pres is not applicable, because it cannot be said that the gift was to the church, because it cared for the religious training of deaf mutes rather than because of the testratrix's affection for her former associates who comprehended the church membership. The legacy therefore lapses. (pp. 914, 915.)

Van Slyck & Mumford, for the complainants.

Comstock & Gardner and Joseph C. Sweeney, for the respondents.

[629] DOUGLAS, J. This bill is brought by the trustees under the will of Sarah Emeline Acly, to obtain a construction of the will. The adverse parties in interest are The Rector, Church Wardens, and Vestrymen of Saint Matthew's Church in the City of New York, a corporation created under the laws of the state of New York, on the one hand, and Joseph C. Sweeney, administrator upon the estate of Albert J. Acly and Horace Hurlbutt, Jr. (the said Acly and Hurlbutt having been

the sole heirs at law and next of kin of the testatrix at the time of her death), on the other.

The case was heard upon bill and answers, from which, and by stipulation filed, the following material facts appear:

The will was executed November 30, 1888. After a direction to pay debts, and a provision for the burial of the testatrix, it gives a legacy to her grandson, and then devises and bequeaths the residue of her estate to trustees for the following purposes, namely: "I direct my said trustees to convert all my diamonds, silverware, and personal effects into money, and to invest the same and reinvest when necessary, in first class real estate mortgages, and to hold the same for and during the natural life of my son, Albert Journeay Acly of said Providence. And I direct my said trustees to pay the income from said investment unto my said son Albert during his natural life, and at his decease to pay the principal thereof unto Saint Ann's Church for Deaf Mutes in the city of New York Reverend Thomas Gallaudet being now rector of said church.

"I direct my said trustee, to convert the remainder of all my estate into money and to invest thereof a sum not exceeding six thousand dollars in a house and lot, either in city or country, as my said son Albert may desire, to be used by my said son for his home during his natural life free of rent. And I direct my said trustees to hold said house and lot during the natural life of my son, and permit him to use the same as aforesaid. At the decease of my said son I direct my said trustees to convey said house and lot in fee simple unto [630] said Saint Ann's Church for Deaf Mutes in the city of New York.

"All the rest and residue of my said converted estate I direct my said trustees to invest in United States government bonds, and to pay the yearly income thereof unto my said son Albert Journeay Acly for and during the term of his natural life, and also to pay unto him such portion or portions of the principal thereof as may at any time seem to them necessary on account of sickness of my said son. At the decease of said Albert Journeay Acly, I direct my said trustees to transfer said United States government bonds unto the aforesaid Saint Ann's Church for Deaf Mutes in the city of New York."

January 3, 1898, the testatrix executed a codicil to her will, in which she made no provision pertinent to this case, except to enlarge the powers of the trustees to appropriate the principal of the trust fund for the support of her son.

Mrs. Acly died February 8, 1902, and her son Albert J. Acly died March 22, 1903.

At the time that the will of Mrs. Acly was executed there was in existence a corporation, organized under the laws of the state of New York, by the name of The Rector, Church Wardens, and Vestrymen of Saint Ann's Church for Deaf Mutes in the city of New York. This church carried on a special and peculiar religious work for the benefit of deaf mutes. It was organized as a Protestant Episcopal church. Of this church Mrs. Acly was at one time a member and communicant, and in it she was greatly interested. Reverend Thomas Gallaudet was, at the time of the will, its rector, and it is admitted that this was probably the corporation intended to be designated by the testatrix by the phrase, "Saint Ann's Church for Deaf Mutes in the city of New York." At the time of the execution of the will this corporation owned a church building on 18th street, near Fifth avenue, in the city of New York. In the year 1895 this corporation sold its church and other property on 18th street, and the church building was torn down. The corporation purchased lots in West 148th and 149th streets, in said city, and had plans prepared for the construction of a new church building thereon. Thereafter, until the year 1897, [631] the work of the church was to a great extent diminished, but it still maintained services, and the Reverend Thomas Gallaudet continued as its rector. In the year 1897 this corporation became consolidated with another corporation, known as The Rector, Church Wardens, and Vestrymen of Saint Matthew's Church in the city of New York, also a Protestant Episcopal church. This consolidation was effected in accordance with the Laws of New York of 1895, chapter 723, section 12, as amended by the Laws of 1896, chapter 56. As the first step in this consolidation, the two corporations, on the fourteenth day of June, 1897, made an agreement in writing in which it was recited that they were desirous of uniting and consolidating into a single corporation. By the terms of this agreement, the name of the consolidated corporation was to be The Rector, Church Wardens, and Vestrymen of Saint Matthew's Church in the City of New York. It was to belong to the Protestant Episcopal church in the United States of America. The new corporation was to assume and carry on the special work among deaf mutes theretofore carried on by Saint Ann's Church, by providing for them sign services and pastoral ministrations, until a building for this special purpose should be ready for occupancy. The present status and rights of the rector emeritus of Saint Ann's Church were to be maintained

and continued. The sum of twenty-five thousand dollars was to be utilized in the erection of a church building upon two of the lots owned by Saint Ann's Church, unless it should be determined to sell said two lots, in which event the proceeds were to be devoted to the purchase of another site upon which to erect said church building. The church building so erected was to be known as Saint Ann's Church for Deaf Mutes in the city of New York, and was to be devoted to the sole and exclusive use of deaf mutes, and to be maintained, so far as not self-supporting, by the consolidated corporation. This agreement received the approval of the bishop and of the standing committee of the Protestant Episcopal Diocese of New York. Proceeding in accordance with the statute referred to, both corporations petitioned the supreme court of the state of New York for their "union and consolidation" into a single corporation, and upon these petitions [632] it was ordered and adjudged that the agreement be approved and confirmed, and that the two corporations be "united and consolidated into a single corporation"; which new corporation should be vested with all the estate, rights, and property belonging to either of the petitioning corporations. Upon the entry of the order of consolidation, the same was recorded in the office of the clerk of the supreme court in the manner provided by law, and also in the office of the register of the county of New York. This record was made in October, 1897. By this order certain persons, some of whom were vestrymen of the original Saint Matthew's Church, and some of whom were vestrymen of the original Saint Ann's Church, were made vestrymen of the new corporation. Immediately after the consolidation, the consolidated corporation, one of these respondents, proceeded to carry out the terms of the agreement between the two previous corporations, and in the same year made a contract for the erection of a church building on certain of the lots belonging to Saint Ann's Church on West 148th street, in the city of New York. The church building was duly erected, and was consecrated by the name of Saint Ann's Church for Deaf Mutes in the city of New York. The Reverend Thomas Gallaudet was made the rector emeritus of the respondent corporation and the vicar of Saint Ann's Church, which offices he continued to hold up to the time of his death, in the year 1902. The respondent corporation has ever since carried on, and still carries on, the precise special work for deaf mutes which was formerly carried on by Saint Ann's Church, and the respondent corporation defrays all the expenses of the work.

There now remains in the hands of the trustees of the trust estate, bequeathed by Mrs. Acly, the sum of about seven thousand five hundred dollars. This fund is claimed by the respondents, Joseph C. Sweeney, administrator, and Horace Hurlbutt, Jr., as intestate estate of Sarah Emeline Acly, and by the respondent corporation, Saint Matthew's Church, as the representative of Saint Ann's Church named in the will.

It is not disputed, and we have no doubt, upon the facts stated, that the original body whose corporate name was "The Rector, Church Wardens, and Vestrymen of Saint Ann's 633 Church for Deaf Mutes in the City of New York" was intended by the testatrix as the legatee mentioned in the will by the name "Saint Ann's Church for Deaf Mutes in the city of New York."

The contest is upon two questions: First, is the respondent Saint Matthew's Church, entitled to claim the legacy upon the ground that to all intents and purposes it is or comprises in itself the same identical organization to which the will directs the trust fund to be paid? Secondly, if not, has the legacy to Saint Ann's Church lapsed, or can the trust be administered cy pres?

We think the first question can only be answered affirmatively if the original legatee still existed as a legal person after the consolidation of it with the original Saint Matthew's Church. This consolidation was made before the death of the testatrix, and unless the legatee was in being at the time of the death the legacy never vested, and it never acquired any rights to transmit to a successor. What, then, was the legal effect of the consolidation of Saint Ann's Church and Saint Matthew's Church upon the corporate existence of the original bodies?

These corporations were creatures of the laws of the State of New York; they originated and continued by virtue of those laws, and the question must be determined by reference to the law under which they existed. The statute under which the consolidation was made, chapter 56, Laws of 1896, which went into effect February 29, 1896, provides that upon petitions by two incorporated churches, and after a hearing, the court may make an order for the consolidation of the corporations, "specifying the name of such new corporation," etc. "When such an order is made and duly entered, the persons constituting such corporations shall become an incorporated church by, and said petitioning churches shall become consolidated under, the

name designated in the order. . . . . And all the estate, rights, powers, and property of whatsoever nature belonging to either corporation shall, without further act or deed, be vested in and transferred to the new corporation as they were vested in or belonged to the former corporations, and the [634] said new corporation shall be liable for all the debts and liabilities of the former corporations in the same manner and as effectually as if said debts or liabilities had been contracted or incurred by the new corporation. A certified copy of such order shall be recorded in the book for recording certificates of incorporation in each county clerk's office in which the certificate of incorporation of each consolidating church was recorded," etc.

This statute provides for the creation of a new corporation, and the transfer to it of the membership, property, rights, and obligations of the former corporations.

We do not see how a corporation can be held to exist in law after the power which has created it has taken from it all its membership, property, and powers—everything which constituted its legal personality.

The question arose in People v. Rice, 11 N. Y. Supp. 249, upon exactly similar provisions in a statute permitting the consolidation of business corporations. The court says: "It is true that the two consolidating bodies were corporations in full life until they formed the new corporation. Then they ceased to exist. It was for this very purpose that they executed the agreement; the purpose to end their own existence and to form a new person. Whenever they form the new corporation their own corporate existence ceases. The new company is not a partnership of the two old companies"; citing Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Railroad Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Railroad Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; and then referring to the words of the consolidation act, which are the same as those in this act.

This decision was affirmed by the court of appeals, 128 N. Y. 591, 29 N. E. 146.

In People v. New York Cent. etc. R. R. Co., 129 N. Y. 474, 29 N. E. 961, 15 L. R. A. 82, the latter court had before them a similar question, and incidentally reaffirmed the decision in People v. Rice, 11 N. Y. Supp. 249. On page 482, Judge Andrews says: "This decision accords with the general current of authority to the effect that the statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that on consolidation being effected under [635] their

provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties to the extent authorized become vested in the consolidated company as a new corporation created by the act of consolidation"; citing, in addition to the cases cited in People v. Rice, 11 N. Y. Supp. 249, Bishop v. Brainerd, 28 Conn. 289; McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; Clearwater v. Meredith, 1 Wall. 25, 17 L. ed. 604; Central R. R. etc. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

These authorities are sufficient to support the contention of the heirs at law that the original legatee named in the will ceased to exist when the new corporation was formed.

The respondent corporation cites two cases in this connection, but neither of them is in point, upon the construction of the New York statute.

In Coldwell v. Holme, 2 Smale & G. 31, a society which answered the description in the will had ceased to exist before the will was made, and a society subsequently established for the same purposes, but differently named, was given the legacy. The ground of the decision was that, though perfectly answering the description, the latter society could not have been intended by the testatrix. The vice-chancellor says: "It would be proceeding upon a very unsound principle in a case in which there is and was at the date of the will but one society at all answering the description, if, in the absence of any evidence to justify such a conclusion, I were to assume that the testatrix was ignorant that the society of which she has been a member had been dissolved, and ignorant also that there was a society in existence similar in name and identical in purpose."

In Hosea v. Jacobs, 98 Mass. 65, the question was whether the legatee mentioned in the will had become extinct; and the court held that it still existed. Says Judge Gray, page 73: "It was strongly argued that although the formal organization of the trustees had been kept up yet they had been dissolved, and had lost their corporate existence by the dissolution of the religious society, to hold and manage the property of which was the sole object of their incorporation. But the facts of the case do not seem to us to support this position."

636 Nor can it be held that, because a certain department of the work of the respondent corporation is identical with that which was carried on by the legatee, the codicil, of a later date than the date of the consolidation, substituted this branch of

the respondent corporation for the corporation named in the will. The codicil does not mention the residuary legatee of the trust fund, and contains nothing to indicate the intention of the testatrix in that regard.

A codicil does not by its republishing operation revive a devise or bequest, the object of which has died in the testator's lifetime: 1 Jarman on Wills, R. & T. ed., 374; Stillwell v. Mellersh, 20 L. J. Eq., N. S., 356; Rymer v. Stanfield [1895], L. R. 1 Ch. D. 19.

We come, then, to the second question, whether or not the case presented demands the exercise of the power of the court to make a cy pres application of a charitable gift.

That the gift is a charitable one cannot be contested. It is well settled that a Christian church, lawfully existing, is a charity in the sense of the statute of 43 Elizabeth, chapter 6: 2 Redfield on Wills, 501; Potter v. Thornton, 7 R. I. 252. But the question is not concluded by that circumstance. Gifts to charitable institutions may lapse, as well as gifts to natural persons.

The law is well [illegible]ted in Teele v. Bishop of Derry, 168 Mass. 341, 60 Am. [illegible] p. 401, 47 N. E. 422, 38 L. R. A. 629, as follows: "[illegible]lty in this case, and generally in cases like it, is one of co[illegible]tion—to find out the intention of the testatrix. When tha[illegible] arrived at, the rules of law which apply seem to be pretty w[illegible] settled. If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then, if by a change of circumstances or in law it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of cy pres will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. . . . . But if the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable 637 intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect and possibly in some cases after it has taken effect, the doctrine of cy pres does not apply—and in the absence of any limitation over, or other provision, the legacy lapses."

Some earlier cases in Massachusetts seem to have given the doctrine of cy pres a more general application, e. g., Winslow v. Cummings, 3 Cush. 358, where the court found, in a be-

quest to an unincorporated society which had gone out of existence at the date of the will, a gift for the charitable purposes which such organization had promoted. It could not have been construed as a gift to the society as a combination of individuals, for they were not capable in law to take as such. The argument, therefore, was sound that the gift was to the objects of the society, not to itself, and the court might well carry out the intention of the testator by giving the legacy to a trustee: See, also, Loscombe v. Wintringham, 13 Beav. 87; In re Clergy Society, 2 Kay & J. 615; Marsh v. Attorney General, 2 Jacob & H. 61, and comments by Sir J. W. Chitty, J., in Rymer v. Stanfield, [1895] L. R. 1 Ch. D. 19.

In Bliss v. American Bible Soc., 2 Allen, 334, the supreme court of Massachusetts went further and held, though citing no authority but Winslow v. Cummings, 3 Cush. 358: "The bequest being to a charity, the object of which can be distinctly ascertained, it is valid, and will be sustained by the court, although the legatee is incapable, by reason of original want of corporate capacity, or from its corporate existence having terminated, of undertaking to execute the trust."

The rule laid down in Teele v. Bishop of Derry, 168 Mass. 341, 60 Am. St. Rep. 401, 47 N. E. 422, 38 L. R. A. 629, restricts these general expressions, and is approved in Bullard v. Shirley, 153 Mass. 559, 560, 27 N. E. 766, 12 L. R. A. 110; and, furthermore, it is in accord with the courts and text-writers, generally, in England and in this country.

So 2 Perry on Trusts, section 726, states the rule as follows: "If it appears from the construction of the whole instrument that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift cy pres the original purpose. [638] If, therefore, it appears that the testator had but one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin. And if the gift cannot vest in the first instance in the donees for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees cy pres"; quoting Carter v. Balfour, 19 Ala. 814; Marsh v. Means, 3 Jur., N. S., 790; Attorney General v. Power, 1 Ball & B. 145; Fisk v. Attorney General, L. R. 2 Eq. 521.

To the same effect see 1 Jarman on Wills, 6th ed., 241; 2 Pomeroy's Equity, 2d ed., 1524; 5 Am. & Eng. Ency. of Law, 2d ed., 939.

The leading case in England is Taylor v. Clark, 1 Drew. 642, decided in 1853, which held that: "There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose and pointing out the mode of carrying it into effect; if that mode fails the court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution, and then if it fails because there is no such institution the gift does not go to charity generally; that distinction is clearly recognized; and it cannot be said that whenever a gift for any charitable purpose fails it is nevertheless to go to charity." "This case," says the lord chancellor, in Rymer v. Stanfield, L. R. 1 Ch. D. 19, decided in 1895, "has been followed ever since."

Chief Justice Durfee, in Pell v. Mercer, 14 R. I. 412, affirms the rule. He says, page 438: "If, however, the trust is for some particular purpose which has been accomplished before the trust becomes available, or which is impracticable, there a cy pres application is more questionable; but even then, if it be clear that a general charitable intent has simply taken form in a particular purpose, the court will best carry out the will of the donor by applying his donation to some other purpose which is as nearly as possible akin to the purpose which is named."

Counsel for the respondent corporation refers to several Rhode Island cases.

639 Wood v. Hammond, 16 R. I. 108, 113, 17 Atl. 324, 18 Atl. 198, presented the question as to which of four corporations the testator had designated by the term "The Nursery," no corporation having existed bearing that name at the time when the will was executed. Following the principle of Winslow v. Cummings, 3 Cush. 358, the court held that "evidently the bequest was intended for the benefit of the nursery as a favorite charity, and should go to the corporation as the medium through which the benefit would reach its destination."

Cady v. Children's Hospital and Nursery, 17 R. I. 207, 21 Atl. 365, was simply a case of imperfect designation.

In Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414, it could not be doubted that the legacy sprang from a general charitable intent if the purpose was a legal charity at all.

In Saint Peter's Church v. Brown, 21 R. I. 367, 43 Atl. 42, the court appointed a trustee to hold a legacy given to an unincorporated religious society.

These cases evidently afford us no assistance in interpreting this will.

To apply the rule to the present case, we do not find in the will of Mrs. Acly any general charitable intention. The legatee named was a church to which she had belonged, and in whose prosperity she took great interest; and it is impossible for us to gather from any of her expressions that she made her gift to the church because it cared for the religious training of deaf mutes, rather than because of her affection for her former associates who composed it. Doubtless the work and the institution were both present in her mind, but who shall say which held the more prominent place? Where the will is silent we are not justified in substituting our arbitrary conjecture.

The case of Rymer v. Stanfield, L. R. 1 Ch. D. 19, is quite similar to this. The bequest there was "to the rector, for the time being, of Saint Thomas Seminary, for the education of priests in the diocese of Westminster, for the purposes of such seminary, five thousand pounds."

The seminary was discontinued before the testator's death, and the students were removed to another seminary which, as 640 part of its work, educated priests for the diocese of Westminster; it was held by Chitty, J., that the gift was confined to the particular institution, and lapsed. And this decision was affirmed on appeal.

The case of Merrill v. Hayden, 86 Me. 133, 29 Atl. 949, presents many points of similarity to the case at bar. The bequest to be construed was: "I give, bequeath, and devise to my daughter Maria K., all the property of which I shall die possessed, to hold during her life the income thereof and so much of the principal as she shall need to be spent by her; and the residue, both of the principal and income, that shall be left at the decease of said Maria, I give and devise to the Maine Free Baptist Home Missionary Society."

The society named existed at the date of the will; but before the testator's death, by authority of an act of the legislature, it had transferred all its property to the Maine Free Baptist Association; and thereupon, by force of said act, became extinct. The new corporation, as the successor of the old, though having somewhat more extended objects, claimed the legacy; but the court held that "by the extinction of the Maine Free Baptist Home Missionary Society (the legatee named in the will), in the lifetime of the testator, the legacy

to that society lapsed to the estate of the testator, and not having been otherwise disposed of by the will it descended to his heirs as undevised estate."

This decision is approved in Brooks v. Belfast, 90 Me. 318, 329, 38 Atl. 222, where the whole subject is exhaustively considered.

We are of opinion, therefore, that the legacy lapsed when the corporation known as Saint Ann's Church for Deaf Mutes ceased to exist; and that the fund in question, on Mrs. Acly's death, descended to her heirs at law and next of kin as intestate estate.

Whether the Consolidation of Corporations works the destruction of the constituent companies is discussed in the monographic note to Morrison v. American Snuff Co., 89 Am. St. Rep. 616-621.

Charities and Trusts for religious purposes are discussed in the monographic note to Hoeffer v. Clogan, 63 Am. St. Rep. 264-266.

A Gift by Will to a supposititious and nonexisting corporation, by name, is not a public charity, and cannot be claimed by another incorporated institution of nearly similar name and nature, under the doctrine of cy pres. Even if the supposititious donee was in existence at the date of the will, still the charity would terminate if the donee ceased to exist before coming into possession of the gift: Stratton v. Physio-Medical College, 149 Mass. 505, 14 Am. St. Rep. 442.

CASES

IN THE

SUPREME COURT

OF

TENNESSEE.

CONTINENTAL FIRE INSURANCE CO. v. WHITAKER.

[112 Tenn. 151, 79 S. W. 119.]

CONSTITUTIONAL LAW—Insurance.—A statute providing that no misrepresentation or warranty, unless made with actual intent to deceive, or unless the risk or loss is thereby increased, shall defeat or avoid an insurance policy, is not unconstitutional as class legislation, and is a valid exercise of the police power, although it applies only to nonassessment insurance companies. (p. 921.)

INSURANCE — Fire-proof Safe Clause — Failure to Observe Warranty.—A warranty in a fire insurance policy that the insured will keep his books of accounts and inventories securely locked in a fire-proof safe at night, and when the building is not actually open for business, or in some place not exposed to fire which would destroy the building insured, is directly within the terms of a statute providing that no misrepresentation or warranty, unless made with actual intent to deceive, or, unless the risk or loss is thereby increased, shall defeat or avoid an insurance policy. Hence, failure to observe the warranty contained in the fire-proof safe clause does not necessarily avoid the policy. (p. 922.)

INSURANCE—Misrepresentations—Evidence.—If the applicant for insurance makes correct statements to the insurance agent, who puts them down incorrectly, and the application is signed by the insured without reading it, he may prove such facts, and is then exonerated from the charge of misrepresentation. (p. 923.)

INSURANCE—Encumbrances—Misrepresentations.—If the insured makes no statements as to encumbrances, and signs the application for insurance without reading it when such application is written by the insurance agent, the insured is not guilty of misrepresentation, although the application falsely states that there is no encumbrance upon the insured property. (p. 923.)

INSURANCE.—Misrepresentation as to Encumbrances will not, under the statute of Tennessee, avoid an insurance policy, since an encumbrance does not increase the risk. (p. 923.)

INSURANCE—Delay in Making Proof of Loss.—If a policy of insurance provides that notice and proof of loss must be furnished

within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, nor impose a forfeiture for a failure to comply with other provisions of the contract, the insured may maintain an action, though he does not furnish notice and proof of loss within the prescribed time, provided he does furnish them at some time prior to commencing his action, although the policy provides that no action can be maintained until after full compliance with all of its requirements. (p. 924.)

CONSTITUTIONAL LAW—Insurance—Penalties.—A statute imposing a penalty upon insurance companies refusing in bad faith to pay policies, and on the insured for bringing suit in bad faith on policies, is valid and not unconstitutional as class legislation. (p. 929.)

T. R. Myers, for the appellant.

W. B. Bates and B. D. Kingree, for the appellees.

[155] NEIL, J. This suit was brought by Whitaker & Dillard, the defendants in error, in the circuit court of Bedford county, against the Continental Fire Insurance Company, seeking to recover on a policy issued by that company to them on May 21, 1901, insuring a storehouse at the sum of one hundred dollars with fixtures therein at one hundred dollars, and a stock of merchandise therein at fifteen hundred dollars; in all seventeen hundred dollars. The property was destroyed by fire on September 9, 1903. The case was tried at the August term, 1903, of Bedford circuit court, when the jury rendered a verdict of seventeen hundred dollars, the full amount of the policy, and for the additional sum of two hundred and fifty dollars attorneys' fees, under acts of 1901, page 248, chapter 141. The insurance company has appealed and assigned errors.

The first error assigned is that there is no evidence to sustain the verdict. Under this are comprehended the following points, viz.: That the defendants in error warranted that they owned the legal title to the property, whereas the testimony shows that they did not; that they warranted that the storehouse was unencumbered, [156] when in fact it was heavily encumbered; that the policy contained what is known as the "iron-safe clause," and the testimony shows that this was not complied with; that the policy provided that the proofs of loss should be furnished within sixty days from the date of the fire, and that this provision was not complied with. It is insisted that all of these were warranties by the terms of the policy, and a failure to comply with either of them avoided the policy.

Another assignment raises the question of the constitutionality of section 22 of the Tennessee insurance act of 1895 (chap-

ter 160, page 332, of the acts of that year). This section is reproduced as section 3306 of Shannon's Code of Tennessee. Other assignments raise the question of the constitutionality of chapter 141, page 248, acts of 1901.

We shall consider these objections in the following order:

1. As to the constitutionality of section 22, chapter 160, page 332, acts of 1895 (Shannon's Code, section 3306).

This section reads as follows: "No written or oral misrepresentation or warranty therein made in the negotiation of a contract or policy of insurance, or in the application therefor by the assured, or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

157 This section has been twice approved and applied in reported cases: Light v. Insurance Co., 105 Tenn. 480, 58 S. W. 851; Hartford Life Ins. Co. v. Stallings, 110 Tenn., 72 S. W. 960. In both of these cases the validity of the legislation was tacitly assumed, but in neither of them was the question of constitutionality directly raised. Some presumption of constitutionality, of course, arises from the above-mentioned decisions applying the law as a valid one; but this does not relieve us of the duty of considering and determining the question when directly made.

The section quoted is assailed on the ground that it is vicious class legislation. It is said that the classification is improper, in the first place, because the rule laid down limiting the power to make binding warranties capable of forfeiting the contract is confined to insurance companies alone; and, in the second place, that it does not apply to all kinds of insurance companies operating upon the assessment plan.

The title of the act of which section 22 is a part (chapter 160, page 332, acts of 1895) indicates that it was passed for the purpose of laying down rules "to govern and regulate the business of insurance . . . . other than life and casualty insurance upon the assessment plan." The act applies to both foreign and domestic companies. The generality of the title, nothing else appearing, would justify the conclusion that it was intended to embrace all kinds of insurance except life insurance upon the assessment plan and casualty insurance upon 158 that plan; thus apparently including within its scope fire insurance companies upon the assessment plan. An attentive examination, however, of the body of the act discloses the fact

that its scope is not so broad. This clearly appears from the provisions of sections 9 and 10, fixing the terms on which foreign fire companies may do business, from which it appears that the act had in contemplation only companies possessing a capital stock. The same appears, in respect of domestic fire insurance companies, from section 13. Moreover, as to the latter the same result is reached by a comparison of the act with chapter 220, page 443, acts of 1895, which makes provision for the business of mutual or assessment fire insurance companies organized or incorporated under the laws of this state. It does not appear that any provision is made in either of the acts for the business of foreign fire companies of this character; that is, those operating on the mutual or assessment plan. The business of life and casualty companies operating upon this plan is provided for by acts of 1887, page 303, chapter 178, and acts of 1893, chapter 6.

It seems, therefore, that the classification made by chapter 160, page 332, acts of 1895, is of all insurance companies other than those operating on the mutual or assessment plan. We have, then, on the one hand, nonassessment companies; on the other, assessment companies. To the first class the provisions of section 22, above copied, apply; to the second class they do not apply. Is there a good reason underlying the classification? [159] We think there is. It is obvious, without going into the particulars of the matter, that the two classes of companies operate on principles so radically different that different and distinct regulations are required for their management. Is there a good reason why the provisions of section 22 should be made to apply to the one class, and not to the other? A sufficient reason seems to be found in the diverse relations which the policy-holders of the different classes bear to their respective companies. In the assessment companies each policy-holder is an integral part of the whole. The members mutually insure each other. In them is vested the control and regulation of the affairs of the company. There is, therefore, in those companies not so great a tendency to oppression, and to the abuse of power, as in stock companies organized for the profit of its stockholders, who need not be policy-holders. It may be well supposed that temptations to the abuse of power, so likely to arise in companies of the latter class, either would not arise at all in those of the former, or, if arising, would be corrected by the organization itself, the interest of each being, in a sense, that of all.

But, aside from this, if, upon the second division of the subject, it be found that section 22 is justified under the police power of the state, it would be immaterial that the legislature had determined to impose it upon policies issued by nonassessment companies, and had not chosen to do the same thing in respect of policies issued by assessment companies. If an act falls under the [160] police power, the legislature must judge of the objects upon which the statute shall operate. The court cannot declare it void on the ground that there are, in its opinion, other objects equally deserving of the attention of the legislature which it has omitted to notice.

That legislation of this character is justifiable under the police power, there can now no longer be any doubt.

There was a similar statute passed in Pennsylvania on June 23, 1885 (Pub. Laws, 134), reading as follows: "Whenever the application for a policy of life insurance contains a warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the face of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." Speaking of this statute, in Pennsylvania Mut. Life Ins. Co. v. Mechanics' Savings Bank etc. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, pending in the circuit court of appeals for the sixth circuit, Taft, J., said: "That such statutes are remedial in their nature, and are quite within the police power of the legislature, is no longer a debatable question"; citing White v. Connecticut Mut. L. Ins. Co., 4 Dill. 177, Fed. Cas. No. 17,545; Society v. Clements, 140 U. S. 226, 11 Sup. Ct. Rep. 822, 35 L. ed. 497; Wall v. Assurance Soc. (C. C.), 32 Fed. 273; Eagle Ins. Co. of Cincinnati v. State, 153 U. S. 446, 14 Sup. Ct. Rep. 868, 38 L. ed. [161] 778; Reilly v. Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552; Insurance Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072; 4 Thompson on Corporations, secs. 5491, 5524. In commenting upon a similar statute in Missouri, Dillon, J., said: "The legislature of Missouri conceived, and, we think, wisely, that the promises held forth to the assured in the policies in general use were but too often a delusion and a snare, and, as the courts were powerless to correct the evil, it ought to be corrected by statute": White v. Connecticut Mut. Life Ins. Co., 4 Dill. 177, Fed. Cas. No. 17,545.

In speaking of a similar statute existing in New Hampshire, the supreme court of that state, through Foster, C. J., said: "The policy and purpose of the law were to promote honest and open fair dealing, to do equal justice, to protect the confidence reposed by the insured in those with whom he may contract, and (especially disclaiming any reference to this defendant company), to spring the traps concealed in the mass of rubbish, before the unwary traveler shall have put his foot in them, to prevent and prohibit, in short, the farce and fraud by which it has too often been found that the party apparently insured by the stipulations written upon one side of a piece of paper was uninsured by the conditions involved in the 'insurance typography' indorsed upon the other side of the same piece of paper": See, also, Hermany v. Life Assn., 151 Pa. St. 17, 24, 24 Atl. 1064; Albert v. Mutual Life Ins. Co., 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327; Germania Ins. Co. [162] v. Rudwig, 80 Ky. 223, overruling Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush, 312, 26 Am. Rep. 194; White v. Providence Savings Life Ins. Soc., 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; Hogan v. Metropolitan Life Ins. Co., 164 Mass. 448-450, 41 N. E. 663.

For the reasons stated, we hold that the section of our insurance act quoted above is not unconstitutional.

2. As to the iron-safe clause.

This clause in the policy reads as follows: "The following covenant and warranty is hereby made a part of this policy: 1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months, prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from this date, and upon demand of the assured, the unearned premium from such date shall be returned; 2. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transactions, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy; 3. The assured will keep such books and inventories, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for [163] business; or, failing in this, the assured will keep such

books and inventories in some place not exposed to fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a bar to any recovery thereon."

The same thing appears in substance in the application, and is therein also denominated a "warranty."

If the foregoing provisions of the policy were binding as a warranty, and that warranty should be strictly construed, it would necessarily follow that the complainant could not recover, inasmuch as the testimony fails to show the provisions referred to were fully complied with. It becomes pertinent, therefore, to pass upon the validity of the said provisions.

We are of the opinion that the said provisions fall directly within the terms of section 22, chapter 160, page 332, acts of 1895. It is not insisted that the representations contained therein were made with actual intent to deceive. It is also clear that the warranty, so-called, purporting to be contained within the clauses above mentioned, could not increase the risk of loss. The provisions referred to could be useful only in preserving for the insurance company, and for the insured as well, accurate evidence of the amount of the goods on hand at the date of the fire. Such evidence is no doubt highly desirable in all cases, and so far the provisions of the iron-safe clause are commendable; and it cannot [164] be doubted that in every case a failure to preserve books and papers, if not satisfactorily explained, would be a circumstance of great weight against the insured in estimating the amount of the loss. It cannot be said, therefore, that the requirements contained in the said iron-safe clause are wholly ineffectual and unimportant. It is true that under the terms of section 22 of the statute above referred to, they cannot be treated as warranties, and as avoiding the policy for failure to comply therewith. The statute must be read into the policy, and so much of the latter as is in conflict with the law so laid down must be held as entirely nugatory as if never written. Still, after expunging so much of the language quoted as undertakes to create a warranty, making void the policy for failure to comply therewith, there yet remains a rational and valid agreement, failure to substantially comply with which imposes upon the insured the duty of making a satisfactory explanation; and a total failure to comply arouses such grounds of suspicion in the mind of the court as to require proof of a high degree of certainty to establish

the amount of the loss. This was, in substance, the view taken by this court in the case of I. Valensky v. Connecticut Fire Ins. Co. (decided at Knoxville during the year 1901).

In the present case it appears there was a reasonable compliance with the terms contained in the iron-safe clause, and the testimony clearly shows that the loss was as great as the recovery allowed in the court below.

165 3. As to misrepresentations concerning the legal title.

The application states that the legal title was in the firm of Whitaker & Dillard, the assured. The testimony, however, shows that Mr. Whitaker stated the matter truly to the agent of the company—that is, that he owned the property, and not the firm; but the agent who wrote the application put it down in the manner stated, and this application was never read over by either Whitaker or Dillard. On the contrary, trusting to the correctness of the agent, whom they knew well, they signed it without reading it. It has been held in this state that it is competent to introduce such testimony, notwithstanding the application, and that, upon such facts being proven, the insured is exonerated from the charge of misrepresentation: Insurance Co. v. Sorrels, 1 Baxt. 352, 25 Am. Rep. 780; Insurance Co. v. National Bank, 88 Tenn. 369, 12 S. W. 915; McCarthy v. Catholic Knights, 102 Tenn. 345, 352, 52 S. W. 142, and authorities cited. See, also, Light v. Insurance Co., 105 Tenn. 480, 58 S. W. 851; Insurance Co. v. Estes, 106 Tenn. 472, 82 Am. St. Rep. 892, 62 S. W. 149, 52 L. R. A. 915.

4. As to the encumbrance upon the storehouse.

The application states that there were no encumbrances, but the testimony shows that the storehouse and the lot on which it was situated were heavily encumbered.

The policy was not avoided by this conflict between the application and the facts as existing at the time, for 166 the reason stated in the preceding division, namely, because it appears that the application was written by the company's agent, and was not read over by the applicants; and, further, that they did not in fact make any statement to the agent that the property was unencumbered. Moreover, it was held in the two cases last cited that a misrepresentation as to encumbrances would not avoid the policy, because such liens do not increase the risk, as the secured debt would remain after the destruction of the property: Light v. Insurance Co., 105 Tenn. 480, 58 S. W. 851; Insurance Co. v. Estes, 106 Tenn. 472, 82 Am. St. Rep. 892, 62 S. W. 149, 52 L. R. A. 915.

5. As to the proofs of loss.

The policy contains the following: "The sum for which this company is liable pursuant to this policy shall be payable sixty days after notice, ascertainment, estimate, satisfactory proof of the loss having been received by this company in accordance with the terms of the policy. . . . . If fire occur the insured shall . . . . within sixty days after the fire, unless such time is extended in writing," make proofs of loss. "The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company," etc. "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire."

No forfeiture is provided for in the policy for failure [167] to furnish the proofs of loss within sixty days next after the fire, although there are many other acts referred to in the policy, and omissions also referred to therein, for which forfeitures are provided.

In the present case the proofs of loss were furnished within sixty-nine days after the fire, but not within sixty days. The suit was not brought until the expiration of sixty days from the filing of the proofs of loss, and it was brought within twelve months after the fire.

The rule laid down in Joyce on Insurance applicable to this state of facts is as follows: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy. And this has been held to be true even though the policy provide that no action can be maintained until after a full compliance with all the requirements thereof."

We regard this as a sound statement of the law, and adopt it. It is supported by numerous authorities: Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Hall v. Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524; Tubbs v. Dwelling House [168] Ins. Co., 84 Mich. 646, 48 N. W. 296;

Rynalski v. Insurance Co., 96 Mich. 395, 55 N. W. 981; German Ins. Co. v. Brown, 16 Ky. Law Rep. 601, 29 S. W. 313; Vangindertaelen v. Phoenix Ins. Co., 82 Wis. 112, 33 Am. St. Rep. 29, 51 S. W. 1122; Flatley v. Phoenix Ins. Co., 95 Wis. 618, 70 N. W. 828; Kahnweiler v. Phoenix Ins. Co. (C. C.), 57 Fed. 562; Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Coventry Mut. Livestock Ins. Assn. v. Evans, 102 Pa. St. 281; Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Rheims v. Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. 670; Shell v. German Ins. Co., 60 Mo. App. 644; Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016.

We are of opinion, therefore, that the case of defendants in error was not barred by their failure to furnish the proofs of loss.

6. As to the constitutionality of chapter 141, page 248, acts of 1901.

This act, so far as necessary to be quoted, reads as follows:

"Section 1. The several insurance companies of this state, and foreign insurance companies, and other corporations, firms, or persons doing insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest [169] thereon, a sum not exceeding twenty-five per cent on the liability for said loss: provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss or injury upon the holder of said policy; and, provided, further, that said additional liability within the limit prescribed shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss and injury thus entailed.

"Sec. 2. In the event it shall be made to appear to the court or jury trying the cause that the action of said policy-holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy-holder shall be liable to such insurance companies, corporations, firms, or persons in a sum not exceeding twenty-five per cent of the amount of loss claimed under said policy; provided, that such liability, within the limits prescribed, shall, in the discretion of the court or jury trying the cause, be measured by the additional expense, loss or injury inflicted upon said insurance companies, corporations, firms or persons by reason of said suit."

It is insisted that the foregoing act is unconstitutional, because no other business except that of insurance is onerated in a similar manner. This objection assumes that there is no such difference between insurance business and other kinds as would justify a different regulation in respect of the former; and, furthermore, [170] that there can be no burden placed by law upon one business which is not at the same time imposed upon all other kinds. Both assumptions are unsound—understanding by the use of the term "burdens" in the latter assumption, matters in the nature of regulations. We need not discuss the second division of the inquiry. It seems clear that there is a sufficient difference between insurance contracts and others to authorize the provisions of the statute. No one would carry insurance except for the indemnity that contracts of this character provide. The burden is a heavy one, and an enormous tax upon individual incomes and upon the whole country as well. This heavy sacrifice is endured through long series of years, with the just expectation that upon the maturity of the contract, insurance companies will promptly and honestly comply with their agreement to pay the indemnity; and this payment is usually of very great importance to policy-holders, not only in the respect of the amount involved, but also in the promptness of the payment. The maturity of these contracts most generally arrives when the beneficiary of them are in dire need. A man's dwelling-house has been destroyed, and he has no means of providing shelter for his family. His storehouse and goods have been consumed by fire, and his business is ruined unless he can promptly recover his insurance. The head of a family dies, and his widow and little ones are left without the means of support, unless they can promptly obtain the relief which the husband and father provided [171] for them through long years of toil and sacrifice in paying insurance premiums. When people, under such conditions, are met by heartbreaking delays induced by the attempt of the companies to enforce upon them through litigation the technical defenses crouched in the jungle of fine print with which these policies are overgrown, and they are compelled to employ counsel and undergo other expense to enable them to maintain their rights and secure a just settlement on a fair and reasonable basis, it is neither unconstitutional, nor improper from any point of view, that the legislature should pass a law one of the purposes of which is to protect the policy-holder from the expenses so made necessary by the action of the insurance company when

it shall be made to appear that the defense is not made in good faith. Even-handed justice is dispensed to the companies in the second section, which provides for a similar recovery of expenses in their favor against the policy-holder if it shall appear that he has not brought suit in good faith.

Statutes even more stringent than our own, in that they do not contain the compensating provisions of the second section of our act, have been sustained as constitutional by the supreme court of the United States. These statutes are set out and discussed in the following cases: Fidelity Mut. Life Assn. of Philadelphia v. Mettler, 185 U. S. 308, 22 Sup. Ct. Rep. 662, 46 L. ed. 922; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. Rep. [172] 126, 47 L. ed. 204; Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. Rep. 565, 47 L. ed. 821.

We shall refer especially to only the latest of these cases. In that case the supreme court had before it a statute of Nebraska, the forty-fifth section of which was as follows: "The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs": Comp. Stats. 1903, c. 43.

Speaking to this section, the court, through Mr. Justice White, said: "All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment are embraced in the following proposition: 1. Because it arbitrarily subjects insurance companies to a liability for attorney's fees when other defendants in other classes of cases are not subjected to such burden; 2. Because, whilst the obligation to pay attorneys' fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and 3. Because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering [173] real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generically considered, do not

possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately, depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court: Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. ed. 552; John Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73, 21 Sup. Ct. Rep. 535, 45 L. ed. 955; Fidelity Mut. Life. Assn. v. Mettle, 185 U. S. 308, 22 Sup. Ct. Rep. 662, 46 L. ed. 922. In the Orient case a statute of the state of Missouri, which subjected fire insurance contracts to an exceptional rule, was upheld, not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also the rule in question was the lawful exercise of the power to classify. In the Warren case a like principle was applied to a statute of the state of Ohio establishing a particular regulation as to life insurance companies. In the Mettler case a [174] statute of the state of Texas was sustained, applicable alone to life insurance company policies, which authorized the enforcement not only of a reasonable attorney's fee, but also of twelve per cent damages after demand, in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts, or to authorize a classification of insurance contracts so as to subject one character of such contracts, when put in one class, to one rule, and other varieties of such contracts, when placed in another class, to a different rule. The only claimed distinction between the cases previously decided and the present one is that in this case the classification is made to depend, not alone upon the general character of the contract, but upon the kind of property insured and the extent of the loss. This, it is elaborately argued, takes this case out of the rule established by the previous cases and causes the statute to be repugnant to the fourteenth amendment. But, as the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for subclassification."

We are of opinion, therefore, that the act referred to is a constitutional and valid law.

[175] As previously stated, under this act the jury allowed two hundred and fifty dollars as attorneys' fees, and this verdict was approved by the court below, and judgment rendered thereon. There was no error in this action of the court.

None of the assignments of error being well taken, and no error being found in the action of the court below, the judgment must be affirmed, with costs.

The Constitutionality of Statutes declaring that no misrepresentation or warranty by an insured shall be deemed material or affect the contract of insurance, unless made with an intent to deceive, or unless the matter represented increases the risk, seems to be assumed in First Nat. Bank v. Fidelity etc. Co., 110 Tenn. 10, 100 Am. St. Rep. 765; Champion Ice Mfg. Co. v. American etc. Trust Co., 115 Ky. 863, 103 Am. St. Rep. 356; Albert v. Mutual Life Ins. Co., 122 N. C. 92, 65 Am. St. Rep. 693.

The Force and Effect of Iron-safe Clauses in fire insurance policies are discussed in Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 90 Am. St. Rep. 98, and cases cited in the cross-reference note thereto; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295.

Misrepresentations as to Encumbrances on Insured Property as affecting the validity of a fire insurance policy are discussed in Home Ins. Co. v. Koob, 113 Ky. 360, 101 Am. St. Rep. 354; Insurance Cos. v. Estes, 106 Tenn. 472, 82 Am. St. Rep. 892; Read v. State Ins. Co., 103 Iowa, 307, 64 Am. St. Rep. 180; Crikelair v. Citizens' Ins. Co., 168 Ill. 309, 61 Am. St. Rep. 119.

If an Insurance Agent makes out an application incorrectly, when the applicant has stated the facts correctly, the errors are chargeable to the insurer, and the policy is binding upon him, notwithstanding a stipulation in the contract that the agent represents the insured. See the monographic notes to Clark v. Union Mut. Fire Ins. Co., 77 Am. Dec. 724-726; Wheaton v. North British Fire Ins. Co., 9 Am. St. Rep. 232, 233, and the subsequent cases of Leonard v. State Mut. Life Assur. Co., 24 R. I. 7, 96 Am. St. Rep. 698, and cases cited in the cross-reference note thereto; Otte v. Hartford Life Ins. Co., 88 Minn. 423, 97 Am. St. Rep. 532. Compare, however, O'Rourke v. Hancock etc. Ins. Co., 23 R. I. 457, 91 Am. St. Rep. 643.

TULANE HOTEL COMPANY v. HOLOHAN.

[112 Tenn. 214, 79 S. W. 113.]

INNKEEPERS—Guest—Who is.—One cannot become the guest of a hotel unless he secures some accommodation therein. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper, before he becomes a guest. (p. 931.)

INNKEEPERS—Liability for Goods of One not a Guest.—An innkeeper to whom one not a guest sends goods to be held without consideration or compensation is not liable as an innkeeper, but simply as a gratuitous bailee, if the goods are lost or damaged. (p. 931.)

INNKEEPERS—Liability for Goods of One not a Guest.—If a person at a depot turns his grips over to the porter of a hotel, intending to become a guest therein, but changes his mind and does not go there, nor procure any accommodation therein, he does not become a guest at the hotel, nor can he charge the hotel-keeper with any liability for the loss of his grips, either as an innkeeper or as a gratuitous bailee. (pp. 931, 932.)

G. Green, for the appellant.

J. Turner and E. S. Ashcraft, for the appellee.

[215] WILKES, J. The facts in this case are undisputed, and are, in substance, as follows:

Mr. Holohan, a traveling salesman, came to Nashville on the morning of September 1, 1901. He brought with him two grips or suit cases. These grips were turned over at the depot to the porter of the Tulane Hotel, as Mr. Holohan intended to stop at that hotel. However, he did not stop at the Tulane Hotel, but after breakfasting at the Terminal Station Hotel, he met a friend of his and went home with him, and did not stop or stay at the Tulane as its guest while on this trip.

Mr. Holohan, however, went to the Tulane on the afternoon of his arrival to secure his grips, but only one of them could be found. Several demands were made [216] on the hotel for the missing grip, but it was not produced, and upon the refusal of the hotel company to pay for it this suit was brought.

Mr. Holohan did not register at the hotel on either September 1 or 2, 1901, did not procure any accommodations there on either of those dates, and was not a guest of the Tulane Hotel while on this visit to the city. The case was tried without a jury, and resulted in judgment for plaintiff for $79.25 and costs, and the hotel company has appealed and assigned errors.

It is assigned as error that there is no evidence to support the finding of the circuit judge, for two reasons: 1. There is no evidence to show that Mr. Holohan was a guest of the hotel, and, unless he is shown to have been a guest, the hotel is not liable, as an innkeeper, for the care of his baggage; 2. There is no evidence to show that the baggage was lost by the negligence of the hotel company, and, unless gross negligence can be imputed to it, it is not liable as a gratuitous bailee.

In the first place, was Mr. Holohan a guest of the hotel. We think not. The universal rule seems to be that one cannot become the guest of a hotel unless he procure some accommodation. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper, before he becomes a guest.

In the case at bar Mr. Holohan procured no accommodation [217] from the hotel, nor did he offer to buy anything.

In the case of Whitemore v. Haroldson, 2 Lea, 312, it was held: "If one not a guest sends goods to an innkeeper without compensation to be made, he would not be subject to the liability of an innkeepr if the goods were lost, but only to such liability as attached to a gratuitous bailee; that is, for loss or damage occasioned by gross negligence. The first requisite of the extraordinary liability now under consideration is that the relation of innkeeper and guest should have existed between the parties at the time the loss or injury occurred; and such liability cannot be imposed in any case where the relation never in fact existed. Under such circumstances, if the innkeeper is a gratuitous bailee, he is only liable in case loss occurs in consequence of gross negligence on his part": 16 Am. & Eng. Ency. of Law, 530. See, also, 2 Parsons on Contracts, p. 165; Schouler on Bailments, sec. 280; Redfield on Carriers and Bailments, sec. 592.

Defendant company cannot, therefore, be held liable as an innkeeper.

It is said that it can be, and should be, held liable as a mere bailee. We do not think that the hotel company, under the facts in this case, ever had the custody or the possession of this baggage. It is true that it was delivered into the care and custody of the hotel porter at the station; but the porter had no authority to receive it, [218] or charge the hotel company for its safekeeping, unless the owner was a guest, or subsequently became one. The porter himself individually was the gratuitous bailee. If he deposited the grip in the hotel office—as,

it appears he did—still it was not placed in the possession or custody of the clerk or baggage-keeper or any other employé of the hotel company, nor was their attention ever called to the same. So far as the hotel is concerned, it is the same as if the porter had gratuitously brought up the valise of a friend or a stranger, and put it down in the hotel office, without calling any attention to it, or giving the hotel employés any notice of it, and no occasion existing for them to take charge of it.

If there is bailment in this case, the train porter is the bailee, and not the hotel company, who, never, by any authorized agent, had any care or custody of the baggage, or any notice of it.

The judgment is reversed, and the suit dismissed, at the cost of appellee.

WHO ARE GUESTS AT INNS.

I. Who are Guests, Generally, 932.
a. Necessity of Being Traveler, 934.
b. Leaving Animal or Property at Inn, 935.
II. Status as Guest or Boarder, 937.
a. Time of Stay, 937.
b. Agreement as to Price of Board, 939.
III. When Person Ceases to be Guest. 939.

I. Who are Guests, Generally.

A guest is generally defined to be a wayfarer who stops at an inn for entertainment and is accepted: Kisten v. Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416; Manning v. Wells, 9 Humph. 746, 51 Am. Dec. 688. If a person goes to an inn as a wayfarer, and the innkeeper receives him as such, the relation of landlord and guest, with all its rights and liabilities, is instantly established between them: Norcross v. Norcross, 53 Me. 163; Jalie v. Cardinal, 35 Wis. 118. To establish the relation of landlord and guest the traveler must visit the hotel or inn for the purpose of availing himself of the entertainment offered—that is, to obtain refreshments or lodging: Bunn v. Johnson, 77 Mo. App. 596. In all definitions of a guest the prominent idea is that he must be a traveler, wayfarer or transient comer to an inn for lodging or entertainment, although it is not essential that he should have come from a distance in order to constitute him a guest: Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 244, 22 N. W. 825. It is immaterial how slight may be the entertainment received or how temporary the use made of the inn. If a person is there in the character of guest the innkeeper is liable as such: Kopper v. Willis, 9 Daly, 460.

In some cases very slight circumstances have been held sufficient to establish the relation of guest and host, with its accompanying

liabilities. Thus, it has been decided that purchasing liquor at an inn is sufficient to constitute the purchaser a guest: McDonald v. Edgerton, 5 Barb. 560. "To constitute one a guest, it is not necessary that he be at the inn in person. It is enough that his property be there, in the charge of his wife, or his servant, or agent, who is there in his employment or as a member of his family. But they must be there in such way that the law implies the property, while there, to be in his possession, and not in the possession of the person who is there as his bailee": Coykendall v. Eaton, 55 Barb. 140. No person can make himself a guest without the innkeeper's consent. Of course, that assent may be given by an agent or servant, intrusted with the duty of receiving or rejecting travelers. There need be no formal bargain, for the acceptance of a person as a guest will be implied when he calls for refreshment which is furnished to him by a servant who has discretion either to give or to withhold it: Gastenhofer v. Clair, 10 Daly, 265. It seems that in order to constitute a person a guest at a hotel, he must obtain therein some refreshment or lodging, and that if he engages and pays for a room therein merely to secure a safe place for the deposit of his valuables, he is not a guest: Bunn v. Johnson, 77 Mo. 596. To entitle a person visiting an inn to be treated as a guest, and to hold the innkeeper responsible for money deposited with him for safekeeping, it must appear that such visit was for the purpose which the common law recognizes as the purpose for which an inn is kept, and when such visit is made by one who does not require the present entertainment or accommodation of such inn, but whose purpose is simply to deposit his money for safekeeping, he is not a guest of the inn and cannot hold the innkeeper liable as such: Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32, 58 Am. Rep. 785, 4 N. E. 398. A person does not become a guest by a simple visit to an inn without receiving any accommodation therein, and he cannot invest himself with that character by merely leaving his goods at the inn: Toub v. Schmidt, 60 Hun, 411. While the definition has been somewhat extended, from its original meaning, it does not, even at this day, include everyone who goes to an inn for convenience to accomplish some purpose. Hence if a man and woman go together or meet by concert at an inn in the own, city or place of their residence, and take a room for no other urpose than to have illicit intercourse, this will not protect either f them while there as the guests of the inn: Curtis v. Murphy, 63 Vis. 4, 53 Am. Rep. 242, 22 N. W. 825.

The common-law liability of innkeeper attaches only to such artiles as are received by him in his capacity as such, from one who ears the relation of guest, by which is meant one who visits the nn for the purposes for which inns are kept. Thus, one who resides t one inn is not a guest at another inn in the same town, at which ball is being given, which he is attending, merely because the inn-

keeper supplies the dancing-room, supper and dressing-room at a certain price per head, where the tickets for the whole entertainment are issued by an outside concern at a higher rate, one of which tickets the visitor has bought: Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762. On the authority of the last-cited case, it was held in Fitch v. Casler, 17 Hun, 126, that the relation of innkeeper and guest did not exist where the former gave a ball at his inn, furnishing music, supper, and the stabling of horses at so much for each attendant of the party, and an attendant paid the price, enjoyed the entertainment furnished, and also bought and paid for liquor furnished by the innkeeper. In such case a person comes to the hotel, not in the character of a traveler and guest, but simply as attending a ball and for the purpose of engaging in a dance: Fitch v. Casler, 17 Hun, 127.

If a person, after becoming a guest at a hotel or inn, goes away for a brief period, leaving his property at the inn and intending to return, he is to be considered as still continuing as a guest: McDonald v. Edgerton, 5 Barb. 560; Toub v. Schmidt, 60 Hun, 411.

a. **Necessity of Being Traveler.**—It has several times been said that "It is a question of no little intricacy to determine who are guests, especially where the hotel is also a boarding-house. If a person puts up at an inn as a traveler, and he is received as such, the relation of innkeeper and guest is immediately established, with all its rights and liabilities, and once established, neither duration of time, nor a special agreement in respect to price, necessarily changes such relation, which continues so long as the person so received sojourns as a traveler, which is also to be presumed until the contrary appears": Ross v. Mellin, 36 Minn. 421, 422, 32 N. W. 172, citing Norcross v. Norcross, 53 Me. 163, Berkshire Woolen Co. v. Proctor, 7 Cush. 417, Hall v. Pike, 100 Mass. 495, Lusk v. Belote, 22 Minn. 468, and Jalie v. Cardinal, 35 Wis. 118, all of which are in point.

A guest is one who as a traveler patronizes an inn as such. "A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder, but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, anyone away from home, receiving accommodations at an inn as a traveler, is a guest and entitled to hold the innkeeper responsible as such": Walling v. Potter, 35 Conn. 185.

"Who are guests in legal contemplation, and when the property of guests may be regarded as committed to the care of the inn-

keeper are sometimes questions of no little intricacy. If a person goes to an inn as a wayfarer and a traveler, and the innkeeper receives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or per week deprives him of his character as a traveler and a guest, provided that he retains his status as a traveler in other respects. The test questions are, Was he a traveler and a wayfarer, and was he received and entertained as such by the innkeeper in his inn? If he was, he at once becomes the innkeeper's guest, and the relation subsists so long as he sojourns there as a traveler": Norcross v. Norcross, 53 Me. 169. And to the same effect, Berkshire Woolen Co. v. Proctor, 7 Cush. 17; Hall v. Pike, 100 Mass. 495; Jalie v. Cardinal, 35 Wis. 128; Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825. The strict liability of an innkeeper to his guest exists only in favor of a traveler as such, and when the person receiving accommodation and entertainment at an inn as a guest has established his status as a traveler, that, like any other status once shown to exist, is to be presumed to have continued: Lusk v. Belote, 22 Minn. 468.

"Everyone who is received into an inn and has entertainment there for which the innkeeper has compensation by way of remuneration or reward for his services is a guest. The relation of host and guest exists. This general definition, however, only includes those who in a legal sense are travelers or wayfarers, and boarders or persons who reside in the same place are not embraced in it. It is only travelers or wayfarers that the innkeeper is bound to accept as guests, and it is for them alone that he is under extraordinary responsibility for the safekeeping of beasts and goods. Inns are for them as the books teach us; that is, for their sustenation and nourishment and protection of their goods from depredation by thieves and robbers at stages of repose in their journeyings": Russell v. Fagan, 7 Houst. (Del.) 389-393, 8 Atl. 258.

b. **Leaving Animal or Property at Inn.**—As to whether one who leaves his horse or other beast of carriage at an inn to be there kept for a compensation, without stopping there himself or receiving personal entertainment, becomes a guest, is a question upon which the reported cases are divided. The better opinion would seem to be that such person does not become a guest at the inn, and that the extraordinary liability of host and guest is not created by such action. Some of the cases hold, however, that a traveler or wayfarer who seeks and obtains feed and lodging for his beasts upon consideration of reward or pay charged him by the innkeeper is a guest of the inn, though not receiving personal entertainment. In other words, that a traveler who commits his horse to an innkeeper to be fed for com-

pensation to be paid therefor is a guest of the inn, although he does not board or lodge there: Russell v. Fagan, 7 Houst. (Del.) 389, 8 Atl. 258; Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471. In Grinnell v. Cook, 3 Hill, 489, 38 Am. Dec. 663, the court held that it was not necessary to the existence of the relation of host and guest that the owner of the goods should be actually infra hospitium at the time the loss happened or the lien accrued. "For example, if a traveler leave his horse at an inn and then go out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveler had not left the inn. If the owner leave the inn and go to another town, intending to be absent two or three days, it seems that the same rule holds good as far as relates to property for the care or keeping of which the host is to receive compensation": Grinnell v. Cook, 3 Hill, 489, 38 Am. Dec. 663. But this case holds, and we think correctly, that one who has neither been at the inn to receive entertainment or accommodation for himself, nor intends going there, though he has sent his horse there to be kept and fed by the innkeeper for a compensation, cannot be regarded as a guest. "I think the extraordinary liability of the innkeeper does not attach until he actually has a guest, and without such liability the innkeeper as such has no lien on the goods": Grinnell v. Cook, 3 Hill, 485-491, 38 Am. Dec. 663. It would certainly seem that the more reasonable rule upon the subject is that where one leaves his horse with an innkeeper, with no intention of stopping at the inn himself, and stops at some other place, where he becomes a guest, he is not the guest of the inn, and that the liability of the innkeeper in such case is simply that of an ordinary bailee for hire. It has been so decided in several cases: Healey v. Gray, 68 Me. 489, 28 Am. Rep. 80; Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409. To the same effect is Toub v. Schmidt, 60 Hun, 409, where it was decided that a peddler who goes to an inn, and by consent of the innkeeper leaves his pack of goods there, but does not engage a room, nor eat nor drink there, does not become a guest at the inn. At the same time an innkeeper is doubtless bound to receive and entertain a strolling peddler, and securely guard his pack if brought infra hospitium, so long as he remains a mere guest: Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 246.

It seems clear that if a traveler puts up his horse at an inn, leaves his goods there, takes a room and some of his meals there, and lodges there part of the time, the relation of host and guest is created, and that it does not cease merely because the guest is occasionally absent from the inn, and sometimes takes his meals elsewhere: McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574. And the relation of innkeeper and guest is created when a minor goes with his father, with a horse and wagon to an inn, delivers the horse and wagon to the inn-

keeper's servant to be cared for, lays aside his outer garments in a room which he enters in the innkeeper's presence, and the father orders and obtains dinner for himself and the minor, and they remain at the inn until evening, when their bill is paid and they leave: Reed v. Amidon, 41 Vt. 15, 98 Am. Dec. 560. In Washburn v. Jones, 14 Barb. 193, it appeared that an agreement was made between the owner of a horse and an innkeeper, by which the latter was to entertain a man having charge of the horse one day in each week, or whenever he should call with such horse, to allow the horse to be kept in a certain stall in his stable, and to furnish provender for him, the man having charge of the horse to care for him exclusively. In pursuance of such agreement the horse was put in such stall, and there received an injury. It was held that it was a case of innkeeper and guest, the horse being infrâ hospitium, which created the relation under the contract. This case was, however, distinguished in Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 244, where it appeared that the owner of a stallion stood him at an inn several days in each week under an agreement with the innkeeper. The owner had a key to the stall and fed and cared for his horse, the innkeeper furnishing the feed for the horse and meals for the owner at reduced rates, as distinguished from the rates charged ordinary travelers, and it was held that such facts did not create the relation of innkeeper and guest, although we are unable to agree with the reasoning upon which such conclusion was reached.

II. Status as Guest or Boarder.

It oftentimes becomes important to determine whether the status of a person stopping at an inn is that of a guest or a boarder. Because, if it is determined that he is a boarder and not a guest, the extraordinary liability of an innkeeper as an insurer of the property of his guest does not attach: Johnson v. Reynolds, 3 Kan. 257; Vance v. Thockmorton, 5 Bush, 41, 96 Am. Dec. 327; Taylor v. Downey, 104 Mich. 532, 53 Am. St. Rep. 472, 62 N. W. 716, 29 L. R. A. 92. Whether an inmate of a hotel is a guest or a boarder is a question of fact always to be determined by the trial court upon the evidence before it: Magee v. Pacific Imp. Co., 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772; Lusk v. Belote, 22 Minn. 468; Hall v. Pike, 100 Mass. 495; Jalie v. Cardinal, 35 Wis. 118.

a. **Time of Stay.**—As to whether an agreement as to the length of time a person is going to stay at an inn or hotel deprives him of the character of a guest and constitutes him a simple boarder, the authorities are not at all harmonious. In a late case it was said that, "In this country hotel-keepers act in a double capacity, being both innkeepers and boarding-house keepers. As innkeepers, they entertain travelers and transient persons, those who come without bargain as to time and price, and go away at pleasure, paying for only

actual entertainment received. As boarding-house keepers they entertain residents and regular boarders and lodgers for definite lengths of time and at specific prices previously agreed upon. In the case before us the defendant was not a traveler nor a transient guest, but one living at a hotel as a regular boarder by the month at a price fixed by contract": Lawrence v. Howard, 1 Utah, 143. In Haff v. Adams (Ariz.), 59 Pac. 111, it was also held that a person boarding and lodging in a hotel at a certain price agreed upon per month was a boarder and not a guest. In this case the court said: "The strict liability of innkeeper exists only in favor of guests and not in favor of boarders. An establishment may have a double character, being both a boarding-house and an inn. In respect to transient persons who, without any stipulated contract, remain from day to day, it would be an inn, while as to those residing there under special contracts it would be a boarding-house": Haff v. Adams (Ariz.), 59 Pac. 112. The following rule has also been laid down: The distinction between a guest and a boarder is this: The guest comes and remains without any bargain as to time, and may go away when he pleases, paying only for the actual entertainment he receives, and that he has remained a long time in the inn in this way does not make him a boarder instead of a guest: Shoecraft v. Bailey, 25 Iowa, 553. It has also been decided that the length of time a person stops at an inn is immaterial in determining whether he is a guest or a boarder, and the question is, Has he retained his character as a traveler? But if he has entered into a special contract as to the price of board and length of his sojourn at the inn, he is not in the sense of the law a guest, but is deemed a boarder: Vance v. Throckmorton, 5 Bush, 41, 96 Am. Dec. 327.

It has also been held that a railroad employé, making regular trips and stopping over at each end of his route at a hotel where he rents a room by the month, and has no other home, is not a guest of the hotel so as to impose upon the hotel-keeper the extraordinary liability of an innkeeper as to such employé's property: Horner v. Harvey, 3 N. Mex. 197, 5 Pac. 329. And it has also been decided that one who goes with his wife to an inn kept as a pleasure resort, with a determination to stay there a long time, if his wife's health should be benefited by her residence there, and arranges for terms of entertainment by the month at rates less than those charged transient customers, and who has no other place of residence, must be regarded as a boarder, and not as a guest: Moore v. Long Beach Development Co., 87 Cal. 483, 22 Am. St. Rep. 265, 26 Pac. 92.

In another and later case in the same state it was held, however, that the fact that the person going to the hotel made a special arrangement with the hotel-keeper respecting the length of his sojourn there is not conclusive of the question whether he is a guest or a boarder, but merely a circumstance to be considered in connection

with all the evidence from which the ultimate fact is to be decided: Magee v. Pacific Improvement Co., 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772; Ross v. Mellin, 36 Minn. 421, 32 N. W. 172.

b. **Agreement as to Price of Board.**—It seems to be well settled that where a traveler or wayfarer or other person entitled to become a guest at an inn, and who puts up at an inn or hotel, and is received there as a guest, and make an agreement with the innkeeper for the price of his board and lodging by the day, week or month, but does not make any agreement as to the time of his stay, he does not thereby cease to be a guest and become a boarder: Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Fay v. Pacific Improvement Co., 93 Cal. 253, 27 Am. St. Rep. 98, 28 Pac. 943, 16 L. R. A. 188; Magee v. Pacific Improvement Co., 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772; Shoecraft v. Bailey, 25 Iowa, 553; Lusk v. Belote, 22 Minn. 468; Ross v. Mellin, 36 Minn. 421, 32 N. W. 172; Berkshire Woolen Co. v. Proctor, 7 Cush. 417; Hall v. Pike, 100 Mass. 495; Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112. Neither the length of time that a man remains at an inn nor any agreement he may make as to the price of board per day or week deprives him of his character as guest and traveler if he retains his status as a traveler in other respects: Jalie v. Cardinal, 35 Wis. 118. A traveler who enters an inn as a guest does not cease to be such by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for part or the whole of the entertainment, or paying for what he has occasion for as his wants are supplied: Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657. A person must be deemed a guest at a hotel, and not a boarder, though upon his arrival he ascertains, before being assigned to a room, what he will have to pay for room and board, if his intention is to remain for a week or two only, and there is no agreement as to the time of his stay, nor any reduction in price in consideration for an agreement to stay a definite time: Fay v. Pacific Improvement Co., 93 Cal. 253, 27 Am. St. Rep. 198, 28 Pac. 943, 16 L. R. A. 188; Magee v. Pacific Improvement Co., 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772. If a person stops at an inn as a traveler, and is received as such, the relation of innkeeper and guest is immediately established, with all its privileges and liabilities, and once established, such relation continues as long as he sojourns as a traveler, which is presumed until the contrary appears. The relation is not necessarily and conclusively changed by an agreement as to price, or any definite length of sojourn: Ross v. Mellin, 36 Minn. 421, 32 N. W. 172.

III. When Person Ceases to be Guest.

One does not cease to be the guest of an innkeeper by going out to dine or lodge with a friend, or by any other temporary absence while

he retains the status of a traveler: Grinnell v. Cook, 3 Hill, 485, 38 Am. Dec. 663; McDonald v. Edgerton, 5 Barb. 560. But if a guest at a hotel pays his bill and has his name stricken from the register in the morning, purposely to relieve himself of his liability as guest during a short absence, intending to return at night, he is not, during his absence, a guest of the inn, as he has terminated such relation, and the innkeeper is not liable as such for his personal baggage stolen during his absence: Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423. It is a universal rule that when a guest settles his bill and departs from the inn or hotel, leaving his baggage behind him, requesting the innkeeper to keep it until his return, which he says will be in a few days, and the innkeeper has ceased to receive any profit from the entertainment of the guest, or any compensation for taking care of his baggage, the relation of innkeeper and guest no longer exists: Glenn v. Jackson, 93 Ala. 342, 9 South. 259, 12 L. R. A. 382; O'Brien v. Vaill, 22 Fla. 628, 1 Am. St. Rep. 219, 7 South. 137; Hays v. Turner, 23 Iowa, 214; Whitemore v. Haroldson, 2 Lea, 312; McDaniels v. Robinson, 28 Vt. 387, 67 Am. Dec. 720. The relation ceases when the guest pays his bill, leaves the hotel with the declared intention of not returning, and in such case it is, at his own peril that he leaves his baggage behind him: Wintermute v. Clark, 5 Sand. 242. A person who surrenders his room and pays his bill terminates by such action the relation of innkeeper and guest, and subsequently thereto the former is not an insurer of the safety of the baggage delivered to him to be held as a pledge for money loaned to or for the accommodation of such guest: Wear v. Gleason, 52 Ark. 364, 20 Am. St. Rep. 186, 12 S. W. 756. If a guest, on leaving a hotel without the intention of returning, but without paying his bill, leaves his hand baggage in charge of the hotel clerk, and returns within forty-eight hours, the relation of guest and innkeeper is terminated, and the latter is no longer liable as an insurer, but only as a gratuitous bailee: Murray v. Marshall, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589. If a guest, being notified to leave, does leave the hotel, for the nonpayment of his board, without taking his baggage, the relation of guest and hotel-keeper is terminated, and the latter's subsequent liability is simply that of a bailee without reward: Lawrence v. Howard, 1 Utah, 142.

An innkeeper's liability for the baggage of his guest is not terminated the instant the guest pays his bill and leaves the hotel, but he continues an insurer thereof for such a reasonable time thereafter as may be necessary to enable the guest to secure its removal, or if the innkeeper, in the ordinary course of his business, undertakes the removal of such baggage to a railroad depot or other place, until he has affected it: Sasseen v. Clark, 37 Ga. 22; Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524; Maxwell v. Gerard, 84 Hun, 537, 32 N. Y. Supp. 849.

SNYDER v. YATES.

[112 Tenn. 309, 79 S. W. 796.]

STATUTES—Extraterritorial Force—Comity.—The statutes of a state have of themselves no extraterritorial force. Whatever effect they have in other states, they have by virtue of the laws of such states or under the doctrine of comity. (p. 942.)

CHATTEL MORTGAGES—Removal of Property to Another State—Registration—Priorities.—A chattel mortgage executed and recorded in another state embracing property then there but afterward removed to Tennessee, is not entitled to registration in the latter state so as to give the mortgagee, on the ground of constructive notice, priority over the lien of resident attaching creditors of the mortgagor. (p. 942.)

COMITY—Priorities.—The doctrine of comity cannot give effect to the registration laws of another state, so as to give nonresidents priority over the liens of resident creditors. (p. 944.)

CONFLICT OF LAW—Contracts of Another State—Comity. If parties to a contract made in one state are impleaded in the courts of another, the latter will expound and enforce the contract according to the law of the state where it was made, if such law is properly pleaded and proven, but such courts will not, on a question of priority of lien, set aside their own rules and the statutes of their state to the prejudice of its own citizens. (p. 944.)

W. B. Leach, for the complainant.

J. A. Bates, for the defendants.

310 WILKES, J. This case presents a contest between a mortgagee and attaching creditors of one Meixsell with respect to certain 311 mules and sawmill machinery. The attaching creditors established their right to priority before the chancellor, and his decree has been affirmed by the court of chancery appeals.

The facts found by the court of chancery appeals, so far as necessary to be stated, are that Meixsell executed a chattel mortgage to Snyder upon the mules and machinery in question. It was acknowledged before Stricklin, a justice of the peace of Saline county, Illinois, and was recorded by John B. Lee in volume 5 of chattel mortgages of said county. John B. Lee, in his certificate, recites that he is clerk of the circuit court and ex officio recorder for said county and state, and that the mortgage was duly recorded. It was afterward recorded without any further probate or certificate in the register's office

of Hickman county, Tennessee, to which place the mortgagor brought the property after the mortgage had been registered in Illinois, and where he engaged in the stave manufacturing business. The mules and machinery were levied upon by attachments and executions at the instance of local creditors of Meixsell after the registration of the instrument in Hickman county.

An original bill was then filed enjoining further proceedings by the creditors, and it was amended so as to make it a replevin suit under which plaintiff retained possession of the property, giving bond. It was afterward sold, and it is agreed that the proceeds are sufficient to satisfy the claims of the creditors [312] if they are entitled to recover as against the trustee.

The sole question presented to this court is whether the complainant's rights under these mortgages are superior to those of the attaching or levying creditors. All other questions are eliminated.

The rights of the complainant depend entirely upon the validity and effect of the mortgage executed in Illinois and its registration in that state. Without passing upon the sufficiency of the pleadings in this case, we are of opinion that complainant is not entitled to priority over the attaching creditors. The subject of the probate of instruments and their registration, and the effect of such registration as to third persons, is governed purely by local statutes, and is a matter entirely unknown to the common law. The statute laws of a state have of themselves no extraterritorial force, and whatever effect they have in foreign states they have by virtue of the laws of such state, or under the doctrine of the comity of states.

The court of chancery appeals rightly held that the statutes of Tennessee do not provide for the registration in this state of the mortgage in question, and that its registration could not operate as notice to the creditors of the mortgagor.

This leaves the complainant to stand alone upon the doctrine of comity. This is the doctrine under which contracts made, rights acquired, and obligations incurred in one country and in accordance with its laws [313] are recognized and enforced by the courts of another country.

In Harrison v. Sterry, 5 Cranch, 299, 3 L. ed. 104, it is said by the court, speaking through Chief Justice Marshall: "The law of a place where a contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is to be expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather

a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the case."

That was a case of bankruptcy involving property belonging to a firm residing in England, upon which the United States, as a creditor, claimed priority under the rule of comity as against British creditors claiming under a trust assignment in the nature of a mortgage made in England upon a cargo of the ship "Semiramis," and certain debts owing by parties in South Carolina, and the claim of priority of the United States was sustained.

This distinction has been recognized and enforced in many cases, and is well settled.

In Le Prince v. Guillemot, 1 Rich. Eq. 213, it was held that a marriage settlement constituting a lien in France was valid here, but that such lien gave no priority over American creditors.

In Underwriters' Wrecking Co. v. The Katie, 3 Woods, 186, Fed. Cas. No. 14,342, the mortgage on the vessel in [314] the home port was given priority over previous liens acquired in a foreign jurisdiction.

In Donald v. Hewitt, 33 Ala. 545, 73 Am. Dec. 431, a lien of a local attaching creditor was preferred to a previous mortgage lien in another state.

In Crowell v. Skipper, 6 Fla. 583, it was held that, although a contract is to be construed according to the lex loci contractus, the property rights under it are subject to the regulations of the country into which the property affected may be brought.

In Lee v. Creditors, 2 La. Ann. 604, a foreign lienholder was held to have acquired no priority in local insolvency proceedings.

In Corbett v. Littlefield, 84 Mich. 35, 22 Am. St. Rep. 684, 27 N. W. 581, 11 L. R. A. 95, a subsequent attaching creditor was given priority over a prior chattel mortgage.

In Saunders v. Williams, 5 N. H. 215, a subsequent attachment was given priority over a previous assignment in insolvency.

The same doctrine has been held in a large number of cases, and we think that it is a better doctrine and not in conflict with any of our adjudications, and not passed on in any of them because not involved, but is in perfect harmony with our statutes and policy on the subject of registration. There are decisions, however, holding a contrary doctrine.

Under our statutes a chattel mortgage is equally [315] good between the parties whether registered or not. The sole purpose and effect of registration is to effectuate notice of it to third persons. The only constructive notice which can bar a creditor is that which the statute causes to flow from a proper registration or noting, although a purchaser may be barred by actual notice. This is the effect of our statutes in respect to chattel mortgages executed within our state, and foreign statutes and the doctrine of comity cannot give any greater or more enlarged effect.

A chattel mortgage executed in another state will be expounded and enforced by the laws of this state upon proper averments and proof of the laws of the state where made, just as if it had been made here; but a different doctrine applies where it is attempted to go further, and affect third persons, especially the creditors of the mortgagor, with constructive legal notice of the mortgagee's rights.

When parties to a foreign contract are impleaded in the courts of this state, this court will expound and enforce the contract according to the laws of the country where it was made, if such laws are properly pleaded and proven; but it will not, in a question of priority, set aside its own statutes and rules to the prejudice of its own citizens.

We are satisfied that the court of chancery appeals has reached the correct result, and its decree is affirmed.

[316] ON REHEARING.

WILKES, J. Upon petition to rehear it is strongly urged that the holding in this case is opposed to previous adjudications of this court; and we are cited to the cases of Eaves v. Gillespie, 1 Swan, 128, Lally v. Holland, 1 Swan, 401, Bank v. Hill, Fontaine & Co., 99 Tenn. 42, 41 S. W. 349, Hughes v. Abston, 105 Tenn. 70, 58 S. W. 296—as holding the contrary doctrine.

The case of Eaves v. Gillespie, 1 Swan, 128, is not at all in point. It has simply held in that case that a parol gift of a slave in a state that has no statute requiring such gift to be by deed, a writing will have the effect to transfer the legal title to the donee. In that case the gift of the slave was made in South Carolina, and delivery was also made there, and title vested by the lex loci before the slave was removed to Tennessee. This being so, the fact that gifts of slaves were required in Tennessee to be evidenced by deed or writing could not de-

vest or disturb that title which already vested. But the proof in that case did not show that the gift, being to a married woman, was to her sole and separate use, and the husband was entitled to the slave, jure mariti, and, having sold her to an innocent purchaser with no notice of the separate estate, the court refused to execute any implied or secret trust in favor of the wife as against such purchaser. The case in no sense involved the effect of our registration laws.

[317] In the case of Lally v. Holland, 1 Swan, 401, there was a defective registration of a deed, and the court held that it would not be constructive notice, and, there being no actual notice, a bona fide innocent purchaser would take the property free from any claim under an instrument with the defective registration. This is really an authority for the view laid down in the original opinion. In Bank v. Hill, Fontaine & Co., 99 Tenn. 42 et seq., 41 S. W. 349, cotton was covered by a trust deed made in Arkansas. It was shipped to Memphis, and sold to Hill, Fontaine & Co. in payment of a pre-existing debt for advancements made upon an agreement to ship the cotton to Hill, Fontaine & Co. The Arkansas deed of trust was not registered in Tennessee, and Hill, Fontaine & Co. had no actual notice of it. It was held that a chattel mortgage good in a foreign state would be upheld and enforced in this state when the property was subsequently brought into this state, and the rights of such vendee or mortgagee will be protected against purchasers as well as attaching and execution creditors; citing quite a number of cases.

But this protection to purchasers and creditors will be given only when it is not contrary to some settled public policy declared by statute or otherwise, or, as stated on page 46: "A party who obtains a good title to movable property absolute or qualified by the laws of another state, when it is there located, will be entitled to maintain and enforce it in the foreign forum against both creditors and purchasers acquiring rights subsequent [318] to its removal, subject alone to the qualification or limitation that there is no statute a public policy contrary thereto." But it was held that Hill, Fontaine & Co. could not hold the proceeds of the cotton sold by them, first, because they claimed to hold it for an antecedent debt; and, second, because they had sufficient information to put them on inquiry which would have disclosed to them the prior rights of the Arkansas parties. They could not, therefore, be classed as innocent purchasers, and entitled to protection as such.

The case of Hughes v. Abston, 105 Tenn. 70, 58 S. W. 296, simply approves and follows the case of Bank v. Hill, Fontaine & Co., 99 Tenn. 42, 41 S. W. 349, and limits the rule as is done in the latter case to instances when the result would not be contrary to sound public policy, declared by statute or otherwise.

That was a case simply when a factor had sold cotton covered by a foreign mortgage, and it did not appear whether the factor still held the proceeds or had paid them over to the mortgagor. There were no rights of creditors or purchasers involved, but simply a question whether the proceeds should be held as those of the mortgagor.

While the language used in these cases is somewhat broad in defining the rights of purchasers and creditors, yet when limited to cases when sound public policy is contravened, and where no statutes are involved, they are in no way applied to the present view, which we consider [319] the rule most in accord with sound public policy and the spirit and object of our registration laws.

Counsel has cited quite a number of cases holding a doctrine different to this, but, as before stated, we think this the better doctrine, and not applied to our previous adjudications when properly applied and limited.

The petition to rehear is dismissed.

A Chattel Mortgage executed and recorded in one state is not constructive notice to purchasers or attaching creditors of property covered by it, but situated in another state at the time the mortgage is executed: Aultman etc. Mach. Co. v. Kennedy, 114 Iowa, 444, 89 Am. St. Rep. 373. And the removal to another state of mortgaged chattels by the mortgagor subjects them to attachment by his creditors in the state to which they are removed, though the mortgage was duly recorded in the state where it was given, and the goods were removed without the mortgagee's knowledge or consent: Corbett v. Littlefield, 84 Mich. 30, 22 Am. St. Rep. 681.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY v. LILLIE.

[112 Tenn. 331, 78 S. W. 1055.]

CARRIERS—Liability for Baggage.—In the carriage of a passenger's baggage, the carrier assumes the full responsibility of a common carrier of goods, and becomes an insurer of its safety, against every accident which is not the act of God or of the public enemy, or the fault of the owner or passenger himself. (p. 951.)

CARRIERS—Liability for Hand Luggage.—A railroad company is not liable as an insurer for the safety of hand baggage or luggage carried by passengers in day coaches, and kept in their custody and control during the entire trip. (p. 952.)

RAILROADS.—Employés of Sleeping-car Companies are employés of the railroad companies, and the latter are responsible for the conduct of such employés. (p. 953.)

RAILROADS—Passengers in Sleeping-cars—Liability for Hand Baggage.—Unless a passenger on entering a sleeping-car assumes and retains the exclusive possession and control of his hand baggage, and either directly or impliedly denies any right of possession or custody to the employés of the road, such baggage must be considered as being in their possession, and the railroad company must be treated as insuring its safety. (p. 953.)

RAILROADS—Liability for Hand Baggage of Passenger in Sleeping-car.—Hand baggage that a passenger takes with him into a sleeping-car, and does not keep about his person or in his hand, nor take with him when he retires to his berth, but which is deposited under the berth, or over it, or at any other convenient place, when the passenger retires for sleep, must be considered as in the custody of the employés of the road, and the railroad must be treated as insuring its safety. (p. 953.)

RAILROADS.—Porters on Sleeping-cars are the servants of the railroad companies on whose trains they work. (p. 953.)

RAILROADS—Loss of Hand Baggage—Presumption of Negligence.—If no explanation is given for the loss of the hand baggage of a passenger in a sleeping-car, the loss is presumed to have occurred through the negligence of the railroad company or by theft, and the company, as an insurer, is liable for the loss. (p. 954.)

Ventrees & Ventrees and C. Waller, Slemons & Barthell, for the appellants.

J. C. Nolen, for the appellee.

WILKES, J. This suit was commenced before a justice of the peace. On appeal it was tried before the judge of the lower court, sitting without the intervention of a jury. There was a judgment for seventy-three dollars in favor of the plaintiff against the defendants, from which the defendants have ap-

pealed. The case involves the liability of a railroad company for the loss of the suit case of a passenger on a sleeping-car.

A request was made of the court that he reduce to writing his findings of fact, which was done. It is as follows:

"This is a suit brought by the plaintiff against the Nashville, Chattanooga and St. Louis Railway and the Illinois Central Railroad for the loss of a dress-suit case, or valise, and its contents. A question was made in regard to the regularity of the proceeding, by which it was claimed that the Illinois Central Railroad was not properly before the court, but counsel for the Illinois Central Railroad Company, in open court, waived the question, and, for the purposes of the suit, conceded it was properly before the court; and therefore in these findings I [334] have considered the case as properly brought against both of the defendants.

"Full stenographic notes were taken of all the proof produced upon the trial, which is hereto attached, and, from said report of the evidence so filed, this court finds as follows:

"That on the night of January 18, 1902, the plaintiff took passage at St. Louis upon a train made up of several day coaches, and the usual sleeper of the Pullman Car Company, for Nashville. The train was composed of cars of the Illinois Central, of the Nashville, Chattanooga and St. Louis, and of the Pullman Car Company, and the engine hauling it from St. Louis to Fulton, Kentucky, was the engine of the Illinois Central, and manned by the officers and crew of said railway. From Fulton, Kentucky, to Nashville, the engine was one of the Nashville, Chattanooga and St. Louis, and the officers and crew manning said engine and train from there to Nashville was of said company.

"That he [the plaintiff] entered the Nashville sleeper at the depot in St. Louis, and carried his own luggage with him into the car, where the same was put down by the seat of the berth to be occupied by him. That the luggage remained in that position until he came to retire, between 12 and 1 o'clock at night, when the plaintiff last remembered to have seen the dress-suit case in question, when he placed the case under his berth, in the space between the two seats constituting a section, the lower berth of which he occupied. That when nearing [335] Nashville, the next morning, and shortly before arriving at the station, his attention was called by a fellow-passenger to the fact of the loss of his grip, whereupon he made search for his own suit case, and failed to find it in his berth, or under

the same, where he had placed it. He then called upon the porter of the sleeper, who, after search, failed to find the same. He then reported the fact to the Pullman Car Company conductor, and later to said company's head office, at Chicago.

"The court further finds that there was no actual possession given by the plaintiff of his suit case to either the porter or conductor of the sleeper, but it was carried by the plaintiff into the car, and set down, in the usual, ordinary way, by the berth or section he was to occupy.

"I further find that, as is usual, there was one car in this train, known as the baggage-car, in which is carried the baggage of any and all passengers who desire it to be carried therein. Said car was in charge of an agent or employé of the defendant railroad companies, who assumed to take entire control and custody of all baggage to be carried in the baggage-car, and to deliver the same at its destination upon the surrender of the check therefor given to the passenger when desiring his baggage to be carried in that car, which facts were known to the plaintiff before and at the time he boarded the train in St. Louis for Nashville.

"The court further finds from the proof that it was the custom, and, as a fact was the case on the night in question, that the rear door of the sleeper was locked [336] from the outside, while standing in the depot, and that the front door of the sleeper was open to permit passengers to enter it at St. Louis; that the conductor of said car was up and awake until 3 or 4 o'clock in the morning; and that the porter was awake and on duty [watch] the whole night, or from the time the train left St. Louis until it arrived at Nashville. There were three sleepers in the train on the night in question, there was a porter on each sleeper, and each porter could pass through to each sleeper.

"I further find that the sleeping-car in which the plaintiff rode was owned by a corporation known as the Pullman Palace Car Company, which company employs and discharges its own employés and operators. It is engaged in the business of furnishing sleeping accommodations to such passengers as pay the usual and customary charges therefor; and that the plaintiff paid to said company the usual charge therefor, and procured from it a ticket entitling him to ride in said car, and to occupy a berth therein, from St. Louis to Nashville.

"I further find that by contract between the defendant railroad companies and the Pullman Palace Car Company, the

sleeper in which the plaintiff was riding was drawn by the engines of the defendant railroad companies, and constituted a part of the train running from St. Louis to Nashville over the lines of road of the defendant companies, and under the control of the train conductor, the sleeping-car being one of the cars that made up the train; and, under the state of facts, the court is to determine whether these defendant companies [337] are liable for the loss of this suit case and its contents, sued for by the plaintiff in this case. The court further finds that no passenger or other person came on board or left the car in question between St. Louis and Nashville on the night in question.

"The court further finds that the porter of the sleeper waked the plaintiff up on the morning in question.

"If it was an open question as to the liability of the defendant, under the authorities in this state, the court would be in grave doubt as to the defendant's liability; but, under the principles announced in the case of the Railroad Co. v. Katzenberger, reported in 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44, the court is of the opinion, and so holds, that the railroad companies are liable for the loss of suit case and its contents, and therefore renders judgment against the defendant companies for the valise as shown by the testimony of plaintiff, or the valise and its contents, sixty-nine dollars and fifty cents, and interest thereon since January 30, 1902, to this date, of three dollars and fifty cents, making a total of seventy-three dollars."

It will be observed that the trial judge does not find how the case was lost.

It is assigned as error that there is no evidence to support the finding of the trial judge, and that his finding of facts does not show any liability upon the part of the railroad company.

It is claimed that there is a marked distinction between the present case and the case of Railroad Co. v. Katzenberger. [338] 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44, which the trial judge was of opinion was conclusive of the controversy in the present case. These distinctions are thus pointed out: That in the present case the defendant roads provided a special car, known as a baggage-car, in which the plaintiff might have deposited his luggage, received a check for the same, and had it carried at the risk of the railroads, without any additional cost to him; that the railroad companies had agents or employés in charge of such cars, intrusted with the special duty of looking after the baggage of passengers, and charged with the duty of

safely delivering it at the point of destination upon surrender of the check given therefor; that the plaintiff knew of these facts when he purchased his ticket and when he boarded the train; and that none of these facts appear in the Katzenberger case. It is further stated that the plaintiff in this case did not give the custody of this valise to any employé of the railroad company, nor to any agent or employé of the sleeping-car company; that he made no offer to so deliver it, but kept the entire control of his valise himself, and continued to keep it throughout the entire time he was a passenger; that in the Katzenberger case the court found that there had been a delivery of the valise to the train porter, who assumed to take control of it, and carried it into the car, and placed it upon a seat by the side of the conductor, near the middle of the car; that in the Katzenberger case the main ground of defense was that the railroad company was entitled to the benefit of limitations [339] upon the ticket of the sleeping-car company, and that these limitations and conditions inured to the benefit of the railroad company.

These distinctions appear to exist, and the real question in the present case is whether they are material to the merits of the present controversy.

It is well settled that, in the carriage of a passenger's baggage, the carrier assumes the full responsibility of a common carrier of goods, and becomes an insurer of its safety against any accident which is not the act of God or of the public enemy, or the fault of the owner or passenger himself: Hutchinson on Carriers, sec. 678.

The real contention in this case is that plaintiff's baggage was not put into the custody and control of any agent or employé of the railroad company, nor even into the custody and control of any agent or employé of the sleeping-car company, but was retained by the plaintiff in his own custody, possession and control; and it is said that the liability of the carrier depends upon whether the passenger has given over the custody and care of his luggage to the control of the carrier, and into his possession, or keeps the entire control over it himself. In the former case, it is said, there may be a liability; in the latter case, there cannot be: Citing Hutchinson on Carriers, sec. 593.

Mr. Thompson, in his work on Negligence, says: "The idea that lies at the foundation of the extraordinary liability of the carrier is that the baggage is in his custody and under his control during the transportation. Hence, [340] in order to hold him responsible if it is lost, it is material to show that it came into his possession": 3 Thompson on Negligence, sec. 3428.

Ray, in his work on Imposed Duties of Carriers of Passengers, says that there must be delivery of the baggage to the carrier, before it can ever be held responsible, under any circumstances, for its loss: Sec. 155.

Van Zile on Bailments and Carriers, section 681, says: "It may be said generally that, for baggage of a passenger that is under the exclusive control of the carrier, the liability of a carrier is that of an insurer."

In section 682 he says: "With regard to the liability of hand baggage, the question of the duty and liability of the carrier seems to depend upon who has the custody or control of the baggage. If the passenger has the entire control and custody of the baggage, to the exclusion of the carrier—if, as has been said, there exists the animo custodiendi upon the part of the passenger to the exclusion of the carrier—then the carrier cannot be held as an insurer, as in the case of baggage in the entire control and custody of the carrier, and will not be liable at all, unless guilty of negligence which results in its loss or damage in the absence of contributory negligence on the part of the passenger": See, also, Ray on Imposed Duties, secs. 558, 559.

We think that in the case of passengers on day coaches who prefer to keep their baggage, and especially their hand luggage in their own possession, and on the seat with them in the day coach, instead of placing it in the [341] baggage-car, the railroad company should not be held liable as an insurer.

There are large numbers of day passengers, and they almost invariably carry hand grips and parcels in their hands, retaining control and custody of them during the entire trip. In such a case the carrier should not be held as an insurer of the safety of the baggage. But does the same rule apply in regard to the baggage of passengers riding in sleeping-cars? These passengers, as a general rule, are going journeys which require, it may be, days and nights to accomplish. They desire superior accommodations and conveniences, and among them, to be relieved from the care and custody of their luggage except so far as they may desire to use it for their daily purposes.

It has been held that the employés of the sleeping-car company are the employés of the railroad company and the railroad company is responsible for the conduct of the sleeping-car's employés: Railroad Co. v. Ray, 101 Tenn. 10, 46 S. W. 554, and cases there cited; Mann Boudoir Car Co. v. Dupre, 21 L. R. A. 289, note.

The contention we have is not between the railroad company and the sleeping-car company, nor between the sleeping-car company and the passenger, but between the railroad company and its passenger riding in the sleeping-car. The question is not one bearing upon the safety of the passenger, but upon the liability of the railroad company for his luggage; and we are of opinion that this case turns upon the question whether or [342] not the luggage must, under the findings of the trial judge, be considered as retained in the exclusive custody of the passenger, or as under the control and in the custody of the employés of the sleeping-car company, who are also, under the law, employés of the railroad company, as to the custody and safety of luggage.

We think it does not matter who brings the luggage upon the car—whether the passenger or the porter—nor is it very material where in the car the luggage is deposited after it is brought in. Unless the passenger shall assume and retain the exclusive possession and control of the baggage, and either directly or impliedly deny any right of possession or custody to the employés of the road, the baggage must be considered as being in the possession of the employés of the sleeping-car company, who are at the same time employés of the railroad company. Especially is this true of luggage and hand baggage that the passenger does not keep about his person or in his hand, nor take with him when he retires to his berth. If the baggage is deposited under the berth, or over it, or at any other convenient place, when the passenger retires for sleep, it must be considered as in the custody of the employés of the road, and the railroad company must be treated as insuring its safety.

The contract to carry is with the railroad company, and not with the sleeping-car company, and the sleeping-car company is not a common carrier in the sense that the railroad company is, nor is the sleeping-car company responsible as an innkeeper; but the railroad company [343] is liable for the negligent acts of its servants. The porter of a sleeping-car is a servant of the railroad company: Pennsylvania R. Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Thorpe v. New York Cent. etc. R. R. Co., 76 N. Y. 406, 32 Am. Rep. 325; Dwinelle v. New York etc. R. R. Co., 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224; Pullman Palace Car Co. v. Cavin, 93 Tenn. 53, 42 Am. St. Rep. 902, 23 S. W. 70, 21 L. R. A. 298; Railroad Co. v. Ray, 101 Tenn. 10, 46 S. W. 551.

We are not able to distinguish the case at bar, in principle from the case of Railroad Co. v. Katzenberger, 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44.

It is said that there is no statement in the opinion of the court in the Katzenberger case that there was a baggage-car attached to the train. But it is a matter of common information that all passenger trains carry baggage-cars, and the failure to mention one in that case was either an omission, or considered unimportant.

We think that the facts in the Katzenberger case show that the baggage was in the custody of the employés of the road, and the same fact appears in this case.

In the former case the court says: "There appears no special custody of the baggage in this case, more than the fact of taking it into the Pullman car and delivering it to the porter, who placed it on a seat opposite the owner."

In each case the facts constitute a delivery to the railroad, and not an exclusive custody by the plaintiff. The article lost, being a suit case, was not easily susceptible [344] of exclusive custody by the passenger, as might be the case with a small hand grip; and the facts show that it was put in the usual place, under the berth, when the passenger retired for sleep.

It is shown that other passengers were on the train. Some of them may have inadvertently or purposely taken the luggage.

Three parties had access to the train and there was an opportunity for the baggage to be taken. That it was taken and lost or destroyed must, under the findings, be conceded. No explanation can be given. There could have been no loss except through negligence or theft. Res ipsa loquitur.

But even if no negligence is shown or can be inferred, the railroad company, under the facts and the law, must be held an insurer of the baggage, and responsible for its loss.

The judgment of the court below is affirmed, with costs.

The Liability of Common Carriers for the baggage of passengers is the subject of an extended note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 343-392.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY v. STONE.

[112 Tenn. 348, 79 S. W. 1031.]

CARRIERS—Contract for Through Transportation—Liability Beyond Own Line.—A common carrier is not bound to transport goods beyond its terminus, and it may therefore stipulate by special contract, not supported by any consideration, that it shall not be liable for loss after the goods have passed beyond the limits of its own line and upon the line of another. (p. 958.)

CARRIERS—Contract for Through Transportation—Limitation upon Liability.—If a carrier receives, transports and delivers a shipment of livestock in good condition and on practically schedule time to a connecting and forwarding line, the initial carrier is not liable for the damaged condition of the stock, when delivered to the consignee, if the contract of carriage especially stipulates that such carrier shall not be liable after delivery to the connecting carrier. (p. 960.)

CARRIERS—Limitation of Liability.—A common carrier may by special contract limit its liability for loss or damage to freight not caused by its own negligence, but the carrier must at the same time hold itself in readiness to transport the freight, with or without such limitation, and allow the shipper a reasonable and bona fide alternative between the two modes of shipment. (p. 962.)

CARRIERS—Contracts Limiting Liability.—A special contract limiting the liability of a common carrier for loss or damage, not caused by his own negligence, to be valid must be fairly obtained, just and reasonable, and based upon a sufficient consideration. (p. 963.)

CARRIERS—Avoidance of Contract Limiting Liability.—A shipper cannot avoid the limitations imposed by a special contract of carriage by showing that he executed it hurriedly, or without due care, nor by showing that he was ignorant of the provisions of the contract. (pp. 964, 965.)

CARRIERS—Special Contract Limiting Liability.—If a carrier seeks to avoid liability for damage to freight, by virtue of a special contract of carriage, the testimony of shippers to the effect that they had no knowledge of any bill of lading for the shipment of freight other than the special contract under which the shipment in suit was made, and did not know of any other contract under which shipments could be made, and had never been offered any other or different contract in their experience as shippers, is relevant to the issue whether the carrier had an ordinary common-law contract of shipment, and held itself in readiness to give the shipper the benefit of such contract if he so desired. (p. 966.)

CARRIERS—Burden of Proof as to Cause of Loss.—In the absence of a special contract limiting his liability, a carrier must affirmatively show that loss of goods shipped was caused by some cause for which he was not responsible, as by the act of God or the public enemy, in order to avoid liability, but where there is a lim-

ited liability contract, and the loss falls within one of the excepted causes, the burden of proof is upon the shipper to show negligence on the part of the carrier. (p. 966.)

CARRIERS — Contract Limiting Liability — Evidence of Amount of Loss.—If a special contract for the carriage of livestock fixing their value and limiting liability for their loss, is assailed as void for want of consideration and other causes, evidence of the market value of the stock lost is admissible, as that value, and not the value fixed by the contract, is the measure of recovery, if the contract is held void. (p. 970.)

CARRIERS—Validity of Special Contract Limiting Liability. A special contract for the shipment of livestock, fixing their value per head at one-third of their real value, is unreasonable and void. (pp. 970, 971.)

Cooper & Cooper, C. S. Ivie, C. Waller, J. D. B. De Bow and J. B. Keeble, for the appellants.

C. C. Trabue, W. B. Bates and T. R. Myers, for the appellees.

[352] McALISTER, J. Stone & Haslett recovered a verdict and judgment in the circuit court of Bedford county against the defendant railroad companies for the sum of nine hundred dollars as damages [353] for injuries to four carloads of hogs shipped from Shelbyville, Tennessee, to Louisville, Kentucky. Both defendants appealed and have assigned errors.

The cause of action, as outlined in the first count of the declaration, was as follows:

"That at 4 o'clock on September 2, 1899, they [plaintiffs] delivered in good condition at Shelbyville, Tennessee, to the defendants, as such common carriers operating such connecting lines, three hundred and sixty-three head of hogs, the property of the plaintiffs, contained in four cars of the defendants, and in consideration of the sum of one hundred and sixty-four dollars—being forty-one dollars per car, and the full tariff rate charged by the defendants for the transportation of said freight—which was paid at the time by the plaintiffs to the defendants, and for which the defendants, as common carriers, received said hogs to be safely carried and delivered within a reasonable time in like good and sound condition in which they were received, to plaintiff's consignees, Mansfield and Jeffries, at Louisville, Kentucky; and the plaintiffs aver that the defendants failed to deliver said hogs within reasonable time and in good and sound condition, as they were bound to do, but on the contrary, wrongfully and negligently delayed said hogs in transit to their destination, and kept them confined in the

cars in which they were shipped without food, water or rest for more than twenty-eight hours after receiving same, when they should and could have been delivered at their destination within seventeen hours from the time they [354] were received; and by reason of the negligence of the defendants and unreasonable delay in the transportation and delivery of said hogs and freight to plaintiff's consignees, one hundred and thirteen of said hogs perished and died, being of the value of ten hundred and forty-three dollars and nineteen cents, which was a total loss to the plaintiff," etc.

It will be observed that under this count plaintiff sought to recover for a breach of the carrier's common-law duty.

The second count of the declaration sets out a written contract of affreightment and alleges a breach of said special contract.

The defendants pleaded the general issue, and also the following special defenses, viz.: 1. That the Nashville, Chattanooga and St. Louis Railway received the hogs under the written contract, and that it transported them with reasonable diligence from Shelbyville to Nashville, and at the latter point delivered them in good condition, within a reasonable time, to the Louisville and Nashville Railroad Company; 2. That it only agreed to transport the hogs from Shelbyville to Nashville, and at the latter point to deliver same to its connecting carrier; 3. That the several clauses of the written contract limiting defendant's common-law liability are valid, and that these clauses exempted from all liability except for gross negligence; that there was no negligence; and that in no case can there be recovered for more than five dollars per head, this being the amount agreed upon as the reasonable value of the animals shipped.

[355] Plaintiffs filed replications to the pleas of the Nashville, Chattanooga and St. Louis Railway, averring that the written contract was without a valuable consideration; that plaintiffs were imposed upon and deceived by defendant's agent; and that the livestock contract was a fraudulent device, conceived for the purpose of avoiding its common-law liability as a common carrier.

The Nashville, Chattanooga and St. Louis Railway filed demurrers to these replications, assigning various causes, but which demurrers were disallowed and overruled by the court.

The first assignment of error is that there is no evidence to support the verdict. This assignment of error is based upon

the assumption that the special contract of shipment entered into between the parties was valid and enforceable, and that the plaintiff failed to show a breach of any stipulation of the special contract. It is denied by the defendants that the written contract was supported by any consideration. It is charged that it was not fairly obtained, for the reason that the shipper had no choice of a contract with and without the common-law liability of the carrier. One of the stipulations of the written contract was that the Nashville, Chattanooga and St. Louis Railway was to be liable for loss or damage only while the stock was being transported upon its own line. It is provided therein that the Nashville, Chattanooga and St. Louis Railway shall transport each carload of stock from the initial point of shipment to Nashville, Tennessee, but it guaranteed a through rate [356] of freight to Louisville, Kentucky, the final destination. The specific stipulation of the contract is as follows: "It is further distinctly understood by the parties hereto that liability of the Nashville, Chattanooga and St. Louis Railway, as carrier of the said stock, shall cease at its destined station, if on said company's railroad; but if destined to a point beyond said company's railroad, then at the company's freight station at its terminus, when ready to be delivered to the owner, consignee or carrier whose line may constitute a part of the route to destination."

In Merchants' Dispatch Trans. Co. v. Bloch Bros., 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881, it was said as follows: "It is likewise settled that a common carrier is not bound in law to transport goods beyond its terminus, and that it may therefore lawfully stipulate that it shall not be liable for loss after the goods have passed beyond the limits of its own line and upon the line of another."

This doctrine is approved in the case of Bird v. Railroad Co., 99 Tenn. 719, 63 Am. St. Rep. 856, 42 S. W. 451, in the following language: "The contract of shipment was made between the shipper and the initial carrier, and was for through transportation from receiving point to destination. The printed form, contract or bill of lading then in use by the carrier contained the provision that in case of loss, damage, detriment or delay the railroad in whose actual custody the goods were at the time of such loss, damage, [357] detriment or delay shall alone be responsible. The first carrier had the legal right at its election to undertake the transportation of the goods to the terminus of its own line merely, or to their ultimate destination.

It was under no legal obligation, in the first instance, to transport them beyond the end of its own line, and for that reason it was authorized in law, when contracting for through transportation, to limit its liability by the clause mentioned": Railroad Co. v. Brumley, 5 Lea, 401; Dillard Bros. v. Railroad Co., 2 Lea, 288; Telegraph Co. v. Munford, 87 Tenn. 190, 10 S. W. 318; 4 Elliott on Railroads, sec. 1432; Hutchinson on Carriers, sec. 149b.

In the case of East Tennessee etc. R. R. Co. v. Brumley, 5 Lea, 401, the headnote is as follows: "A railroad company receiving goods for shipment beyond the terminus of its line may, by special contract, protect itself against liability for loss not occurring on its own line. And such contract will be presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles, and taken like bills of lading."

In view of these principles and the special contract in this case, the duty imposed upon the Nashville, Chattanooga and St. Louis Railway was to promptly deliver in good condition the consignment of hogs to its connecting [358] carrier. It was not necessary that such a stipulation be supported by any consideration. The common-law liability of the common carrier did not extend beyond the terminus of its own line, and there is nothing in this contract limiting the common-law liability of defendant company on this subject. Such a stipulation in a contract has uniformly been upheld regardless of consideration.

The question, then, is presented whether any loss or injury to this consignment of hogs occurred while it was in transit on the road of the Nashville, Chattanooga and St. Louis Railway.

The proof is undisputed that the shipment of hogs left Shelbyville for Wartrace on defendant's road at 4 o'clock P. M., on September 2, 1899. The train reached Wartrace without delay or accident of any kind at 4:50 P. M. The first freight train to Nashville on the main line after the hogs arrived at Wartrace was due at Wartrace at 8:20 P. M. This train arrived at 8:50 P. M., or thirty minutes late. The carload of hogs was attached to this train, and carried to Nashville, reaching the latter point at 12:40 A. M., being ten minutes late. The regular schedule of the company between Shelbyville and Nashville for shipments of livestock was that they should leave

Shelbyville at 4:20 P. M., and make connection at Wartrace at 8:20 P. M. This schedule had been observed for a long time, and the evidence shows that plaintiffs were thoroughly familiar with the schedule when they made the shipment. It was stated that they [359] selected the afternoon train on account of the hot weather, and to get the benefit of the night run.

The proof is undisputed that when the four carloads of hogs left Wartrace and reached Nashville the hogs were in good condition. It appears that four hours elapsed from the arrival of the hogs at Wartrace until their departure, but no negligence is imputed to defendant company on this account, since it forwarded the hogs on its first freight train leaving Wartrace after their arrival. No duty devolved upon defendant company to make up a special train and forward these hogs to Nashville, especially as the shippers were advised of the forwarding train, and consigned the hogs from Wartrace to make connection with that particular train. They were well aware that the delay at Wartrace would be unavoidable in order to make connection with the first forwarding freight train to Nashville. As already stated, the hogs reached Nashville at 12:40 A. M., and, in accordance with an established usage existing between the two railroad companies, the cars containing the hogs were delivered to the Louisville and Nashville Railroad Company on what is known as the "Clay street track." It appears from the record that this transfer track was in charge of a joint clerk representing both companies, and that this clerk, in accordance with his duty, kept a record of the cars of stock delivered by the Nashville, Chattanooga and St. Louis Railway upon this transfer track for transportation over the Louisville and Nashville Railroad. The record kept by this clerk shows [360] that these particular cars were delivered upon said transfer track by the Nashville, Chattanooga and St. Louis Railway at 1:50 A. M., September 3, 1899, and the hogs were apparently in good condition. The proof is that this was a delivery by the Nashville, Chattanooga and St. Louis Railway to the Louisville and Nashville Railroad Company, and was so regarded by both companies. It further appears that these cars were transferred by the Louisville and Nashville Railroad from the Clay street line at 2:50 A. M., and delivered in East Nashville at 2:58 A. M. It further appears that the train containing these four cars left Nashville for Bowling Green, Kentucky, at 4:45 A. M., September 3d. The proof shows that Bowling Green was reached at 10:45 A. M., September 3, 1899,

and the hogs were then in good condition. The train left Bowling Green at 12:30 A. M., September 3d, and arrived at Louisville that evening about 8:25 o'clock. The proof is undisputed that the hogs sustained no injury in course of transportation over the line of the Nashville, Chattanooga and St. Louis Railway. Indeed, it is shown by evidence which is not controverted that nine hours after the hogs were delivered to the Louisville and Nashville Railroad Company they were in good condition. The only suggestion of negligence chargeable to the Nashville, Chattanooga and St. Louis Railroad Company is that the hogs were permitted to remain at Wartrace four hours before being forwarded to Nashville; but, as already stated, they were shipped at the earliest practicable schedule time, and this fact was well [361] known to the shippers before the hogs left Shelbyville. As already stated, no duty was imposed upon defendant company to make up a special train and forward these hogs to Nashville in view of the facts stated.

So we conclude there is no evidence whatever in the record to support the verdict of the jury so far as it attached any liability to the Nashville, Chattanooga and St. Louis Railway Company for injury and loss in this shipment.

We will now proceed to consider the assignments of error made on behalf of the Louisville and Nashville Railroad Company.

The sixth assignment is as follows: "Common carriers may limit or exempt themselves from common law liability by special contract, except for their own negligence or that of their employés, provided the contract is made upon a genuine consideration to the shipper to compensate him for surrendering his right to hold the railroad liable as a common carrier, and that the contract is fair and reasonable in view of all the circumstances; and, further, that the shipper assents to the same knowingly and understandingly. It is a question of fact for them to decide from the evidence whether this contract was knowingly and fairly accepted by the plaintiff, so as to make it binding."

It is also objected that the court charged: "If the shipper assents to the same knowingly and understandingly; that is, he may have the option and choice that he can ship under the common-law contract, which [362] gives the carrier no exemption from common-law liability, by paying more for this way of shipment, or that he can ship by special contract at a less rate, which gives certain exemptions to the carrier, so that he

can have the alternative of choosing between two terms of shipment."

Again, the court charged: "The defendants had a right to a special contract to limit their liability, not from their own negligence; but to do this they were bound to give to the plaintiffs at the time an opportunity to choose upon just and reasonable terms between the special contract and the common-law contract that made them liable for full damages."

Now, it is insisted that in these instructions the court committed two errors, viz.: 1. In holding that, in order to make the contract valid and binding, it must appear that the shipper assented to it knowingly and understandingly; 2. That it was also necessary to the validity of such a contract that the shipper must have been given at the time an opportunity to choose between the two contracts.

It is insisted that the only duty required of the carrier was that he should be ready and willing to accept the stock upon its common-law liability, if demanded by the shipper.

It is further insisted that it was not encumbent upon the agent of the company to notify the shipper of the two forms of contract, or to give to the shipper at the [362] time an opportunity of choosing between the two contracts.

These limited carrier contracts have frequently been before this court for consideration, and the principles of law governing them are well settled. In the case of Railroad Co. v. Manchester Mills, 88 Tenn. 655, 14 S. W. 315, this court said, viz.: "A contract exempting the carrier from liability for the loss by fire, not due to negligence, and based upon a sufficient consideration, the shipper having the right to elect between a liability with and without fire clause, is valid, and a through bill of lading, where the shipment is over more than one line, or upon reduced rates, is a sufficient consideration."

In the case last referred to the court says: "It is well settled that a common carrier may make a stipulation in its bill of lading to limit its common-law liability for loss or damage of freight not caused by its own negligence, but this cannot be validly done unless the carrier at the time holds himself in readiness to transport the freight with or without such limitation, and allows the shipper a reasonable and bona fide alternative between the two modes of shipment."

The same rule is laid down in the following cases: Railroad v. Gilbert Parks & Co., 88 Tenn. 431, 12 S. W. 1018; Railroad Co. v. Wynn, 88 Tenn. 321, 14 S. W. 211; Lancaster Mills

v. Merchants' Cotton Press Co., 89 Tenn. 31, 24 Am. St. Rep. 586, 14 S. W. 317; Railroad Co. v. Craig, 102 Tenn. 301, 302, 52 S. W. 164.

[364] In the case of Railroad Co. v. Gilbert, Parkes & Co., 88 Tenn. 430, 12 S. W. 1018, Judge Caldwell, speaking for the court, among other things, said, viz.: "It is not every such special contract, however, that is effective. To be valid, it must be fairly obtained, and just and reasonable."

Again, the court says: "A company standing before the public as common carrier, and enjoying the advantages and franchises as such, must be ready to do the business of a common carrier, with the full measure of the responsibility imposed by the common law; and it at the same time may offer to do the same business with a limited liability, the limitation resting upon a sufficient consideration. An offer or readiness to transport the goods of its customer with the one or other degree of responsibility, at his option, is as little as can be required of any common carrier. Less than this does not present a bona fide and reasonable alternative. Reduction of freight charges is the usual consideration for the diminution of responsibility on the part of the company."

In Louisville etc. R. R. Co. v. Sowell, 90 Tenn. 24, 15 S. W. 838, the court said, viz.: "Both the witness for plaintiff and defendant agreed that no other contract than that signed was tendered, but they also agreed that no other was demanded. It was therefore competent for the defendant to show that it was willing and ready to execute another upon terms reasonable to the shipper, if he preferred it, in which no agreed valuation or limitation of [365] liability was required as a prerequisite to the shipment. He need not specifically tender another contract. An offer or readiness to make it is sufficient: Railroad Co. v. Gilbert, Parkes & Co., 88 Tenn. 431-435, 12 S. W. 1018; Railroad Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314."

This principle is also recognized in the case of Deming & Co. v. Merchants' Cotton Press etc. Co., 90 Tenn. 327, 17 S. W. 93, 13 L. R. A. 518, where the following language is used: "The option need not in fact be offered to the shipper. It is sufficient if it would have been given had he demanded it"; citing Railroad Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Louisville etc. R. R. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837.

It is conceded by plaintiffs that they did not demand any other contract of affreightment, while the agents of the com-

pany admit that they did not offer any other alternative than the livestock contract, but claim they would have shipped the hogs under common-law liability if plaintiff had so required. The written contract recites on its face that it is made in consideration of a special rate lower than the tariff rate charged when this contract is not executed. The regular tariff rate was double the rate charged in this livestock contract as appears therein.

It will be observed that the charge of the circuit judge embodied the salient features presented in the text of the cases decided by this court, and in many instances [366] the exact language of the court is imported into the charge. But it is said that mere readiness on the part of the carrier to issue a common-law bill of lading, if demanded by the shipper, was all that is required.

The circuit judge, in his charge, embodied this idea in the following language, viz.: "The plaintiffs are entitled to have the bona fide alternative of choosing between the two contracts, and an offer or readiness to ship the hogs with either contract on the part of the defendant's agent was necessary, and was sufficient." If the counsel desired more explicit instructions on this branch of the case supplementary requests should have been submitted; but certainly the court, in its general charge, has presented the law on this subject as laid down by the decisions of this court.

The court further instructed the jury that "an agreement to ship the hogs at a less rate than their regular tariff rate would be a valuable consideration to plaintiff to accept the special contract. An agreement or the giving of a bill of lading through to Louisville would be a valuable consideration, and in deciding whether there was a fair consideration for the special contract you will decide what was the regular tariff rate—whether it was eighty-two dollars per car, or whether it was forty-one dollars per car. Also the giving of free transportation to plaintiff or his employés would be a valuable consideration."

The proof showed that the livestock contracts were signed both by the railroad agent and the shippers, and [367] that for many years the shippers had been signing similar contracts, and must have been aware of their contents. "The shipper cannot avoid the limitations imposed by the special contract by showing that he executed it hurriedly, or without due care, nor by showing that he was ignorant of the provisions of the contract. If he executed the contract by affixing his signature,

or by accepting without objection a receipt containing the limitation, he will be conclusively presumed to have assented to its provisions, no fraud on the part of the carrier appearing": 5 Am. & Eng. Ency. of Law, 300; Coles v. Louisville R. R. Co., 41 Ill. App. 607; Johnstone v. Richmond, 39 S. C. 55, 17 S. E. 512. In the latter case the court said: "The shipper was not obliged to sign the contract without reading it, and, if he saw fit to do so, he must take the consequences." Again, it was said by Mr. Justice McGowan in Bethea v. Northwestern R. R. Co., 26 S. C. 96, 1 S. E. 376, viz.: "It would tend to disturb the force of all contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation or mistake, it must be presumed that he read the contract, and assented to its provisions": Germania Fire Ins. Co. v. Memphis etc. R. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill v. Syracuse etc. R. R. Co., 73 N. Y. 351, 29 Am. Rep. 163.

368 In the first line of the contract it is recited that the tariff rate on this shipment from Shelbyville, Tennessee, to Louisville, Kentucky, is eighty-two dollars per car; thus indicating clearly to the shipper the regular tariff rate. It is then recited that the company will transport the stock at the reduced rate of forty-one dollars per car in consideration that the shipper will accept certain risks of transportation. The record shows that the shipping agents of defendant company had instructions to issue a bill of lading with common-law liability if the shipper demanded it, and that the tariff rate on such a bill of lading should be twice the special rate. It is shown that the agent of the company at Shelbyville was authorized to receive these hogs for shipment without the execution of a special livestock contract, but upon the company's common-law liability. There is other evidence that the agent at Shelbysville stood ready and willing to receive livestock for transportation without the execution of the livestock contract.

The next assignment of error is that the court erred in admitting, over the objection of defendants, testimony of the plaintiffs below and of other shippers to the effect that they had no knowledge of any bill of lading for the shipment of livestock other than the special livestock contract under which this shipment was made, and did not know of any other contract under which stock could have been shipped; that they had

never been offered any other or different contract in all their experience as shippers.

[369] We think this testimony was relevant to the issue whether defendant company had a common-law contract of shipment and held itself in readiness to give the shipper the benefit of such an alternative. These shippers, it appears, had been transacting business with the company for many years, and had never been advised of such alternative contract. In this view the evidence was competent for the purpose of contradicting the evidence introduced on behalf of the company tending to show that the company held itself in readiness to give the shipper benefit of such common-law contract.

The sixth assignment is that the court erred in instructing the jury as follows: "It devolves upon the plaintiff to make out his case by a preponderance of the evidence, but, if the hogs were delivered to defendants in good condition, and put in the cars in proper amount, and when they reached their destination any part of them were dead or injured, the burden of proof is upon the defendants to show that they are not guilty of negligence in causing their death or damage. The mere fact that the hogs were dead when they reached their destination at Louisville does not absolutely fix the liability upon the defendants, but devolves upon them the necessity of showing that their death did not result from their fault or negligence."

This language, as applied to the special limited contract, would be erroneous; but the court immediately proceeds to explain that this is the rule that would apply [370] if the contract was not binding—that is to say, upon the common-law liability of the carrier; but, if the contract was binding, and the loss was caused by delay in transportation, the company would be exempt from liability by the special conditions of the contract, and in such a case the burden of proving negligence would devolve upon plaintiffs. This was a correct exposition of the law. In the absence of a special contract limiting his liability, the carrier must affirmatively show that the loss was occasioned by some cause for which he was not responsible—as, for instance, the act of God or the public enemy—but where there is a limited liability contract, and the loss falls within one of the excepted causes the burden of proof is upon the shipper to show negligence.

In the case of Railroad Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314, one of the questions at issue was in respect of the burden of proof where the contract of shipment exempted

the company from liability by loss from fire, and the court in that case held as follows: "In a suit against a common carrier for loss of goods shipped on a valid contract exempting from liability by loss from fire not due to its own negligence, proof of the mere fact of the loss of the goods by fire, without more, raises no presumption of negligence against the carrier. The plaintiff must in such case aver, and the burden of proof lies upon him to prove affirmatively, that the loss by fire resulted from the carrier's negligence": Hutchinson on Carriers, sec. 767; Railroad v. Mitchell, [371] 11 Heisk. 404; Sommers v. Mississippi etc. R. R. Co., 7 Lea, 201; Merchants' Dispatch etc. Co. v. Bloch Bros., 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Burke v. Louisville etc. R. Co., 7 Heisk. 462, 19 Am. Rep. 618; Railway Co. v. Wynn, 88 Tenn. 331, 14 S. W. 311; Runyan v. Caldwell, 7 Humph. 134; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Transportation Co. v. Downer, 11 Wall. 129, 20 L. ed. 160 Clark v. Barnwell, 12 How. 272, 13 L. ed. 985; Memphis etc. R. R. Co. v. Holloway, 9 Baxt. 188.

The next assignment of error is that there is no evidence to support the verdict and judgment against the Louisville and Nashville Railroad Company. The evidence establishes the fact that the cars containing the hogs were delivered upon the Clay street track by the Nashville, Chattanooga and St. Louis Railway at 1:50 A. M., September 3, 1899, and the evidence is undisputed that this transfer constituted a delivery to the Louisville and Nashville Railroad. The hogs at that time were in good condition. They left Nashville on the Louisville and Nashville Railroad at 4:45 A. M., and reached Bowling Green, Kentucky, at 10:45 A. M., in apparent good condition. Nine hours had thus elapsed since the hogs left the custody of the Nashville and Chattanooga Railroad, and were still in good condition apparently. The hogs left Bowling Green at 12:30 P. M., September 3, 1899, and arrived in Louisville at 8:25 P. M. the same day. The proof is that the hogs were in bad condition when they left Bowling Green at 12:30, and continued to die between [372] that point and Louisville. It will thus be seen that these hogs remained in possession of the Louisville and Nashville Railroad Company in Nashville for about three hours before they were started for Louisville at 4:45 A. M. There was a further delay of nearly two hours at Bowling Green before the hogs were started for Louisville at 12:30 P. M. in bad condition. They reached Louisville at about 6:30 P. M., but were not delivered to the consignee until about 8:25 P. M.,

a delay of nearly two hours. Here is a delay of about seven hours wholly unaccounted for by defendant company.

The proof is that the weather was very warm, and the hogs were left exposed to the heat of the sun, standing on the side-tracks at these different stations, and when they were finally delivered to the consignee, one hundred and sixteen of the number, or nearly one-third of the entire consignment, were dead. While they were in possession of the Louisville and Nashville Railroad Company they had been in transit or course of transportation for over twenty-eight hours, during which time they had not been fed or watered as required by act of Congress in interstate shipments.

It is conceded by counsel for plaintiffs that until about 12:30 P. M. of the second day—the time of leaving Bowling Green for Louisville—the hogs were in good condition. As stated by him: "It was the last stage of the trip from Bowling Green to Louisville that resulted so disastrously. If these hogs had been delivered in Louisville, by midday of September 3d, the next day after [373] their shipment, the loss would have been comparatively small. The record shows that the Louisville and Nashville Railroad Company had the hogs in its possession for a period of nearly nineteen hours. The hot ride in the sun on the second day, without food and water, was undoubtedly the occasion of the loss and damage to these hogs."

It is in the proof that a freight train left Nashville for Louisville at 2:35 A. M., September 3d, and it is not satisfactorily explained from this record why these hogs were not forwarded to Louisville on that train, instead of being delayed for a later train leaving Nashville at 4:45 A. M. This in itself is evidence of negligence. We think that there was sufficient evidence to support a verdict against the Louisville and Nashville Railroad Company, conceding that the livestock contracts are binding.

The last assignment of error is that the court erred in admitting testimony, over the objection of defendants, touching the market value of the hogs that died before reaching the point of destination. The insistence made on behalf of the company is that the value of the hogs is to be determined by the valuation clause contained in the special livestock contract as follows: "And it is further agreed that should damage occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a horse or mule, one hundred dollars; cattle, thirty dollars each; chickens, ducks and

guinea fowls, seventy-five cents per dozen; [374] geese, one dollar per dozen; turkeys, one dollar and fifty cents per dozen; other animals at five dollars each; which amounts it is agreed are as much as such animals herein agreed to be transported are reasonably worth."

In Louisville etc. R. R. Co. v. Sowell, 90 Tenn. 19, 15 S. W. 837, such a stipulation in a livestock contract was held valid upon the ground that it was not a mere exemption from liability, but was an assumption of liability to the full limit of the value of the property as agreed upon by the parties to the contract. It was said such contract, fairly made, is not void as against public policy, or for any other reason, citing Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 343, 5 Sup. Ct. Rep. 151, 28 L. ed. 717.

It was held in that case that the valuation clause referred to the particular horses injured, and was as definite and specific in effect as though it had named or perfectly described the horses shipped. It was in reference to them, and only them, it became a contract when signed and accepted by the shipper and needed no more particular reference.

The case of Railroad Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311, was distinguished from the Sowell case, upon the ground that in the former there was no agreement as to the value of the animals shipped.

In Starnes v. Railroad Co., 91 Tenn. 518, 19 S. W. 675, it appeared certain horses were shipped under a livestock contract which contained the following stipulation: "And it is further agreed that, should damage occur for which the said party of the first part may be [375] liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a horse or mule one hundred dollars, which amount it is agreed is as much as such stock as are herein agreed to be transported are reasonably worth." It was held this was a valid limitation of the liability of the carrier.

It will be observed that the contract now under consideration contains a stipulation almost identical with that adjudged to be valid in the Sowell and Starnes cases. It expressly provides that the valuation therein fixed is as much as such stock as are therein agreed to be transported are reasonably worth. The only indefiniteness on the face of the stipulation contained in the written contracts herein is whether the term "other animals" refers to the hogs shipped. We think no other reason-

able construction could be placed on the contract. The stipulation in the contract, after specifying a valuation for certain classes of animals and fowls, then provides that the valuation on other animals such as are herein agreed to be transported is fixed at five dollars each as their reasonable worth. It requires no latitude of construction to say that the contract fixing the value of the animals at five dollars each referred to the hogs about to be shipped.

The charge of the court touching this special clause in the contract of shipment is also assigned as error.

The court instructed the jury that, if they found the contract was not binding on the plaintiffs, they would [376] be entitled to recover the market value of the hogs. The court, however, continued: "But if you find the contract is binding, then you will be limited in the amount you shall find for plaintiffs to the sum of five dollars per hog for each one lost or damaged, it being stipulated in the special contract that this amount is all defendants shall be liable for in the event of loss, and this sum of five dollars per head is agreed upon as the amount said hogs are reasonably worth," etc.

There was no error in the action of the circuit judge in admitting the proof touching the market value of the hogs dead and injured, for, if the jury should find that the special livestock contract was not binding upon the plaintiffs for want of consideration, or for other cause explained in the charge of this court, then the value of the hogs would be determined by the market rates prevailing at that time, and not by the special limitations of the contract.

It is evident from the damages assessed by the jury that they did not measure the value of the hogs by the valuation clause in the written contract, but applied the market value of the hogs at the time of their loss and injury. So that the charge of the court, if erroneous, was necessarily prejudicial to defendant companies.

While we are of opinion that the term "other animals," employed in the contract, did refer to the valuation of the particular hogs shipped therein, yet we are of opinion, in view of the value of these hogs at the date of their shipment, that the valuation of five dollars each was an [377] unreasonable valuation. Such stipulations, to be upheld by the court, must be fair and reasonable. The evidence shows that the hogs shipped were worth two and three times the valuation inserted in the written contract. In view of the fact that the shipper has to

accept the contract tendered by the carrier in order to get reduced rates of shipment, and has little to do with formulating the details of the contract, the courts hold that such limited liability contracts cannot be enforced by the carrier, unless they are fair and reasonable.

As stated by Mr. Justice Bradley in Railroad Co. v. Lockwood, 17 Wall. 379, 21 L. ed. 627: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the court. His business will not admit of such a course. He prefers rather to accept any bill of lading or sign any paper the carrier presents."

In view of the real value of these hogs at date of their shipment, we cannot think that a valuation clause of five dollars per head is a reasonable stipulation.

The result is the judgment as to the Nashville, Chattanooga and St. Louis Railroad is reversed, but affirmed as to the Louisville and Nashville Railroad.

The Limitation of a Carrier's Liability in bills of lading is the subject of a monographic note to Chicago etc. R. R. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 74-134. As to whether an initial carrier can limit its own liability to its own line, see page 102 of this note; as to the effect of a shipper failing to read the bill of lading, see page 82; as to the necessity of the limitation being reasonable, see page 91; and as to the effect of limitations on the amount recoverable in case of loss, see pages 105-113.

SYKES v. STATE.

[112 Tenn. 572, 82 S. W. 185.]

CRIMINAL LAW—Evidence of Other Crimes.—The general rule is that evidence of offenses other than that for which the defendant is on trial cannot be introduced, but to this rule there are well-established exceptions. (p. 972.)

CRIMINAL LAW—Evidence of Other Crimes—Sexual Offenses. In prosecutions for sexual crimes, it is competent to introduce evidence of both prior and subsequent acts of like nature in corroboration or explanation of the act relied upon for conviction, or for the purpose of showing the relation and mutual disposition of the parties or guilty knowledge or intent on the part of the accused. (pp. 973, 974.)

CRIMINAL LAW—Evidence of Other Acts in Prosecutions for Violation of Age of Consent Statutes.—In prosecutions for sexual intercourse in violation of an age of consent statute, evidence of both prior and subsequent acts of like nature by the parties is admissible in corroboration or explanation of the act relied upon for conviction. (p. 975.)

Hale & Hale, for the appellant.

C. T. Cates, attorney general, and Fisher & Fisher, for the state.

576 NEIL, J. There was no error in the action of the circuit judge.

The general rule is that evidence of offenses other than that for which the defendant is on trial cannot be introduced: Kinchelow v. State, 5 Humph. 10. But there are well-established exceptions: Peek v. State, 2 Humph. 78; Williams v. State, 8 Humph. 585; Britt v. State, 9 Humph. 31; Defrese v. State, 3 Heisk. 53, 8 Am. Rep. 1; Cole v. State, 6 Bart. 239; Dobson v. State, 5 Lea, 273; Mynatt v. State, 8 Lea, 47; Murphy v. State, 9 Lea, 377; Links v. State, 13 Lea, 710, 711; Foute v. State, 15 Lea, 719; Rafferty v. State, 91 Tenn. 655, 664, 665, 16 S. W. 728. The principle is that no evidence is competent which is not of a character to throw light on the issue, and it is usually true that proof of other crimes committed will not reflect any light upon the special crime with which the defendant stands charged. But in a case like the one before us other acts of intercourse do illustrate and tend to prove the commission of the particular act of intercourse which the state has elected to try the prisoner on, because they show the relations—the state of intimacy—existing between

the prisoner and the girl and tend to make very probable the commission of the crime charged.

In the class of cases we are dealing with, and in cognate cases, there is a conflict of authority as to whether evidence may be introduced tending to show subsequent acts, but the great weight of authority is in favor of the [577] admissibility of prior acts: Bass v. State, 103 Ga. 227, 29 S. E. 966; Taylor v. State, 110 Ga. 150, 35 S. E. 161; Commonwealth v. Lahey, 14 Gray, 91; State v. Snover, 64 N. J. L. 65, 44 Atl. 850; State v. Jackson, 65 N. J. L. 62, 46 Atl. 767; State v. Kemp, 87 N. C. 538; State v. Pippin, 88 N. C. 646; State v. Guest, 100 N. C. 410, 6 S. E. 253; State v. Dukes, 119 N. C. 782, 25 S. E. 786; Commonwealth v. Bell, 166 Pa. St. 405, 31 Atl. 123; State v. Potter, 52 Vt. 33; Crane v. People, 65 Ill. App. 492; State v. Briggs, 68 Iowa, 416, 27 N. W. 358; State v. Henderson, 84 Iowa, 161, 50 N. W. 758; State v. Clawson, 32 Mo. App. 93; Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182; McLeod v. State, 35 Ala. 395; Cross v. State, 78 Ala. 430; Brevaldo v. State, 21 Fla. 789; United States v. Griego (N. Mex.), 72 Pac. 20; People v. Patterson, 102 Cal. 239, 36 Pac. 436; People v. Jenness, 5 Mich. 305; People v. Skutt, 96 Mich. 449, 56 N. W. 11; People v. Schilling, 110 Mich. 412, 68 N. W. 233; State v. Markins, 95 Ind. 464, 48 Am. Rep. 733; Lefforge v. State, 129 Ind. 551, 29 N. E. 834; State v. De Hart, 109 La. 580, 33 South. 605—cases covering prosecutions for various forms of illicit commerce between the sexes—fornication, adultery and incest.

Upon the trial of an indictment for rape in the second degree—a crime in substance the same as the violation of the age of consent law in this state—it was held in New York that evidence of prior acts of intercourse between the defendant and the female in question [578] was admissible, as tending to establish the commission of the special act under examination, and to corroborate the evidence of witnesses testifying thereto: People v. Grauer, 12 App. Div. 464. 42 N. Y. Supp. 721. To same effect, see State v. Peres, 27 Mont. 358, 71 Pac. 162; Regina v. Chambers, 3 Cox C. C. 92.

In a prosecution for an assault with intent to commit rape, it has been held in this state that evidence of prior assaults for the same purpose was admissible, as tending to show the intent with which the assault in question was made: Williams v. State, 8 Humph. 585. See, also, People v. O'Sullivan, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880; State v. Scott, 172

Mo. 536, 72 S. W. 897; People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; State v. Walters, 45 Iowa, 389.

In prosecutions for lewdness, it has been held in this state that it is competent to prove both prior and subsequent acts: Mynatt v. State, 8 Lea, 47; Cole v. State, 6 Baxt. 239. In the following cases, arising in other jurisdictions, it has likewise been held that, in prosecutions for sexual crimes, it is competent to introduce evidence of subsequent acts in corroboration or explanation of the act in question, or for the purpose of showing the relation and mutual disposition of the parties viz.: Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182; Alsabrooks v. State, 52 Ala. 24; Crane v. People, 65 Ill. App. 492, affirmed in 168 Ill. 395, 48 N. E. 54; State v. Withom, 72 Me. 531; State v. Williams, 76 Me. 480; State v. Way, 5 Neb. 283; State v. Robertson, 121 N. C. 551, 28 S. E. 59.

579 The following observations upon the general subject occurring in Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110, are deemed useful in the present inquiry, although that was an action for divorce. In disapproving of Commonwealth v. Horton, 2 Gray 354, and particularly of Commonwealth v. Thrasher, 11 Gray, 450 (both prosecutions for adultery), in which latter case it had been held that prior acts of improper familiarity, which themselves amounted to adultery between the same persons, were inadmissible either in corroboration of witnesses for the commonwealth, or to show the disposition of the parties to commit the crime, the court said: "But by the application of the rule laid down in these cases, evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The adulterous disposition of the defendant and the particeps criminis cannot be shown by stronger evidence than the criminal act itself. There is no one act by which the moral status of the parties is more clearly defined, and, for the purposes and with the limitations here stated, evidence of it is always admissible." And the court also said: "The fact that the conduct relied on has occurred since the filing of the libel does not exclude it, and proof of the continuance of the same questionable 580 relations during the intervening time, as in the case at bar, will add to its weight." This case was followed and approved

in Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346, wherein it was held that, on the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties near the time charged, though in another county, was admissible to support the indictment.

In State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124, in which evidence of both prior and subsequent acts of intercourse was offered, the court, after holding that evidence of prior acts was admissible, continued: "It is further urged that, if this evidence of prior acts is admissible, there is a distinction between it and that of subsequent acts, and that the latter is not admissible. But this relation of intimacy, as before suggested, does not usually take place suddenly, and the fact of its existence at any time to that extent that intercourse was actually had would be some evidence that the relation had been existing previously, and, offered with evidence of other acts so as to show the relation to be continuous through a period covering the time in question, would be quite material and convincing. The important question is whether the facts would be legitimately material, and, if they were, then whether prior or subsequent would be of no importance."

There are many authorities that adopt the contrary view as to subsequent acts, but we deem the foregoing the better view. Such evidence cannot fail to be useful [581] in fastening the charge of guilt upon guilty persons, and cannot unduly harm any defendant, when the trial judge exercises proper care in explaining to the jury its purpose and effect, and so limiting it. He should be studiously careful to give such instruction.

The case of Holt v. State, 107 Tenn. 539, 64 S. W. 473, cited by counsel, is not an authority contrary to the principle announced, either as to evidence of prior or subsequent acts. The substance of that decision is that while, on a presentment for carrying a pistol, the state may prove several instances of such infraction of the law within twelve months of the finding of the presentment, yet it must finally elect upon which one it will claim a conviction, and the other must then be withdrawn from the consideration of the jury. The discussion contained in the opinion shows that the court did not have in mind the principle above referred to, and did not intend to impeach it. Moreover, the case is found to be in entire harmony with the principle when it is considered that there is nothing in evidence that the defendant carried a pistol on a given occasion tending to show that he carried a pistol on another and different occasion.

There being no error in the matter complained of in the above-mentioned assignment, and all of the other assignments having been considered and overruled in a memorandum filed with the record, and no other error being discoverable by the court, it results that the judgment must be affirmed.

WHEN EVIDENCE OF OTHER CRIMES IS ADMISSIBLE IN CRIMINAL PROSECUTIONS.

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I. Scope of Note.

Inasmuch as the cases, in which evidence of other crimes has been used, are so very numerous that it would be impracticable and unprofitable to comment upon them in detail, we shall confine the scope of this note merely to a discussion of the general principles of law which obtains with respect to the admission of evidence of other crimes in criminal prosecutions, with merely sufficient reference to the circumstances of individual cases to illustrate those principles. We shall exclude from our consideration evidence of mere declarations or acts indicating an intention to commit a crime unless the acts of that character are shown to constitute a crime.

II. General Rule and General Exceptions Thereto.

The law respecting the subject of this note is largely made up of the exceptions to the general rule. The general rule does not seem to be disputed, although it is stated in varied phraseology by different courts. In the principal case (Sykes v. State, ante, p. 972) it was stated that the general rule is that evidence of offenses other than that for which the defendant is on trial cannot be introduced, but that to this rule there are well-established exceptions.

In People v. Molineux, 168 N. Y. 264, 61 N. E. 286, it was said: "The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment or as aiding the proofs that he is guilty of the crime charged: 1 Bishop's New Criminal Procedure, sec. 1120. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit, which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule and the reasons upon which it rests are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto."

In People v. Shea, 147 N. Y. 78, 41 N. E. 505, the court also referred to the fact that the general rule above stated has been consistently maintained ever since the common law has itself been in existence. It also adverted to the contrary rule which obtains in France, under which the whole past life of the accused, his tendencies, his nature, associates and practices are gone into in order to prove his likelihood of committing the crime with which he is charged.

So, also, in State v. Raymond, 53 N. J. L. 260, 21 Atl. 328, the court said: "The general rule on this subject is that, upon the

trial of a person for one crime, evidence that he has been guilty of other crimes is irrelevant."

It would seem, however, that the general rule is not generally well stated unless the exceptions are also stated at the same time. It would seem that, ordinarily, proof that a person was guilty of some other crime constitutes no proof that he is guilty of the one for which he is being tried, and that accordingly, the proof of the other crime under such circumstances is irrelevant and hence not admissible. Besides, its admission under such circumstances would tend to disturb the presumption of innocence which follows the defendant.

In State v. Rainsbarger, 71 Iowa, 746, 31 N. W. 865, it was held that the state would not be permitted to introduce evidence of the commission by the defendant of crimes entirely distinct from that for which he was being tried in order to show him guilty of that crime. And in a very recent case, that of State v. Berger, 121 Iowa, 581, 96 N. W. 1094, in a prosecution for burglary it was held that evidence of a conversation had with defendant several months previous to the burglary for which he was being tried, in which he admitted that he had burglarized a car, was inadmissible since its only apparent purpose was to discredit the defendant in advance, and by showing him to be of criminal habits make it easier for the jury to believe him guilty of the offense on trial.

A somewhat similar statement was made in Hill v. State, 44 Tex. Cr. Rep. 603, 73 S. W. 9, where it was stated that proof of other distinct crimes than the one on trial was not admissible unless it is res gestae or serves to identify the defendant or prove system; and hence on a trial for burglary, it is not permissible to prove that on the same night, but at a different time and place, the defendant and a confederate had burglarized another house.

So, also, in Baker v. People, 105 Ill. 452, it was held that evidence of a similar offense founded upon another and separate transaction was not admissible, but that exceptions to this rule are found in prosecutions for passing counterfeit money and like offenses for the purpose of showing guilty knowledge.. And in a very recent case in that same court (Glover v. People, 204 Ill. 170, 68 N. E. 464), the court, after stating that as a general rule evidence of another and different offense is not admissible, stated that where the evidence of such other offense tends to prove the charge in the indictment, the mere fact that it may also tend to prove another crime does not make it inadmissible. Hence it held where a person is on trial for extorting money by threats, evidence that the accused had upon a former occasion threatened to kill the same party unless he paid him money is competent to characterize the conduct and language of the accused at the time that the money was extorted.

In other words, evidence of other crimes is admissible where it tends to prove the one under investigation: State v. Jones, 171 Mo.

401, 94 Am. St. Rep. 786, 71 S. W. 680. And in all cases where the guilt of the defendant depends upon the intent, purpose or design with which the act was done, or upon his guilty knowledge thereof, the rule is that collateral facts, in which he bore a part, may be examined into for the purpose of establishing such guilty intent, design, purpose or knowledge, even though such facts show another crime: Bottomley v. United States, 1 Story, 135 Fed. Cas. No. 1688. Guilty knowledge, where that is essential, may always be shown by the commission of other offenses tending to show such knowledge: Morgan v. State, 56 Neb. 696, 77 N. W. 64.

The general exceptions to the general rule were tersely stated by Justice Werner in People v. Molineux, 168 N. Y. 264, 61 N. E. 286, in the following language: "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial": See People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; State v. Vance, 119 Iowa, 685, 94 N. W. 204; State v. Ames, 90 Minn. 183, 96 N. W. 330; State v. Raymond, 53 N. J. L. 260, 21 Atl. 328, to the same effect. In Wallace v. State, 41 Fla. 547, 26 South. 713, it was stated that evidence of other crimes is not admissible to prove that defendant committed the crime charged, but to show his purpose, plan, intent or knowledge, or to show that the acts charged against him were not the result of accident, mistake or inadvertence, or to rebut a defense which would otherwise be open to the accused. And in Horn v. State (Wyo.), 73 Pac. 705, it was held that proof of participation in other crimes of a similar nature is only competent where it bears directly upon the question of the guilt of the accused of the crime for which he is being tried. If it has a reasonable tendency to establish the guilt of the accused of the crime charged against him, other than by merely showing a capacity or disposition to commit such crimes, or to show that having committed one crime it is probable he might be guilty of the crime charged against him, it is admissible.

"The general rule is based upon the principle that the commission of an independent offense is not in itself proof of the commission of another crime—the one for which the defendant is prosecuted. Cases, however, occur where the crime charged in the information is so connected with the crime, proof of which is sought to be introduced, that the existence of the one tends to establish the existence of the other, and that is the reason on which the exception to the general rule is based": State v. Lancaster (Idaho), 78 Pac. 1081.

Likewise in the principal case (Sykes v. State, ante, p. 972) the court, after stating the general rule, said: "The principle is that no evidence is competent which is not of a character to throw light on

the issue, and it is usually true that proof of other crimes committed will not reflect any light upon the special crime with which the defendant stands charged. But in a case like the one before us other acts of intercourse do illustrate and tend to prove the commission of the particular act of intercourse which the state has elected to try the prisoner on, because they show the relations—the state of intimacy—existing between the prisoner and the girl and tend to make very probable the commission of the crime charged."

So, also, in People v. Doty, 175 N. Y. 164, 67 N. E. 303, it was stated that the reason for the rule which allows evidence of other crimes to prove the particular crime for which the defendant is on trial is based on the necessity for establishing criminal intent in cases where such intent may not be inferred from the commission of the single act charged in the indictment. It adverted to the crimes of receiving stolen property, passing counterfeit money, obtaining money or property under false pretenses and forgeries, as belonging to a class of crimes in which resort must frequently be had to other crimes in order to prove the criminal intent of the accused person.

III. Necessity for Relevancy or Logical Connection Between Other Offenses and that on Trial.

Where evidence tending to prove another offense is offered, the same considerations arise with respect to its admissibility as upon the offer of other testimony. The question then arises, Is the evidence relevant and competent? Does it tend to prove any fact material to the issues in the case: People v. Tucker, 104 Cal. 440, 38 Pac. 195. The general rule is that all evidence must be pertinent to the point in issue, but if it be pertinent and tends to prove the crime charged against the defendant, it is not to be rejected merely because it also tends to prove the commission of other crimes: People v. Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846. Of course ordinarily evidence of other offenses has no tendency to establish the offense on trial, but when it does not tend to prove a material issue, the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for excluding it: People v. Walters, 98 Cal. 138, 32 Pac. 864. In other words, any relevant testimony is admissible even though it does tend to prove the accused guilty of another crime: Weed v. People, 56 N. Y. 628; People v. Shea, 147 N. Y. 78, 41 N. E. 505. State v. Franklin, 69 Kan. 798, 77 Pac. 588. "If the evidence tends to establish the res gestae, or to prove a relation or competent fact or circumstance connecting defendant with the crime charged, or to explain the intent of defendant in connection with the property he is charged with stealing, or to make out his guilt by circumstances, it is competent for the state to adduce evidence of extraneous crimes". Kelly v. State, 31 Tex. Cr. Rep. 211, 20 S. W. 365. Thus in People v. Doody, 172 N. Y. 165, 64 N. E. 807, which was a prosecution for perjury, in that the defendant on a second trial of a bribery prosecution testified that he did not remember the details of the conspiracy

to bribe to which he had testified in the first trial, it was held that his evidence in the first trial in which he accused himself and others of a conspiracy to defraud the city through corrupt contracts was admissible even though it did tend to prove other crimes. So, also, in Commonwealth v. Major, 198 Pa. St. 290, 82 Am. St. Rep. 803, 47 Atl. 741, it was held, if on a trial for murder of a policeman it appears that the accused, after committing a burglary at one place, went to another house where he was engaged in committing a second burglary at the time he shot the policeman, who had followed him from the scene of the first burglary, evidence of the second burglary is admissible even though the policeman did not know that he was in the act of committing it at the time of the homicide.

But evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute is generally excluded. The reason is that such evidence tends to draw away the minds of the jurors from the point at issue and to excite prejudice and mislead them, and moreover the defendant not having notice of such a course of evidence is not prepared to rebut it: Farris v. People, 129 Ill. 521, 16 Am. St. Rep. 283, 21 N. E. 821, 4 L. R. A. 582. Hence it is said that where the evidence of the other crime relates to another and entirely different transaction, and in no way tends to prove the fact in issue, it is not admissible even though it tends to prove that defendant was bad enough to commit a robbery: People v. Jones, 31 Cal. 565.

And it seems that where only a part of a declaration was relevant to the crime on trial, the other portions not relevant should be excluded where they relate to other crimes. Thus it was held that a conversation between a police officer and a defendant relating in part to the offense on trial is admissible as to that portion, but not as to such portion which merely tends to show that the defendant is a notorious criminal: Commonwealth v. Campbell, 155 Mass. 537, 30 N. E. 72.

In other words, the test of the admissibility of evidence of other offenses than the one charged is the logical connection between the offenses in the mind of the criminal: People v. Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846. Or, as was said by the court in State v. Raymond, 53 N. J. L. 260, 21 Atl. 328, in speaking on this subject: "Whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown. But it must not be supposed that the defendant's propensity to commit crime, or even to commit crimes of the same sort as that charged, can be put in evidence to prove his guilt of the particular offense; for, however reasonable would be the deduction that, when a pocket is picked in a group of persons, of whom only one is addicted to picking pockets, he is the offender, his singularity in this respect could not, under our legal theory, figure as proof of his guilt. There must appear

between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition."

Of course criminal intent is the main thing to be proved in the majority of instances. But the criminal intent in the case on trial cannot be predicated upon or inferred from the commission of another act or crime unless there is such a relation of time, place and circumstances between the two acts or crimes that the proof of one logically tends to prove the intent and purpose underlying the other: People v. Doty, 175 N. Y. 164, 67 N. E. 303. Hence it also said that to make evidence of one crime evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose intended to be accomplished, or there must be a connection for the purpose of identifying the actor in both by which it is shown that he who committed the one must also have committed the other: Shaffner v. Commonwealth, 72 Pa. St. 65, 13 Am. Rep. 649. See, also, Glenn v. State (Tex. Cr. Rep.), 76 S. W. 757, to the same effect. In Towne v. People, 89 Ill. App. 258, the court, after adverting to the fact that the courts in different jurisdictions vary in their application of the exceptions to the general rule, said: "Yet they are all in substantial accord upon the proposition that unless there be some logical connection between the two offenses either by reason of both being of the res gestae or both being part of one system, or the one tending to show a scienter in the other, the general rule governs; and the exception to it does not apply."

But where evidence of another crime is temporarily admitted upon the promise of the court that "unless defendant's connection with such prior difficulty [an assault] was shown, he should withdraw it from the jury," the court should, on the failure to thus connect the defendant with it, withdraw it from the consideration of the jury.

IV. Other Offenses as an Essential Ingredient of Crime Charged.

Although particular criminal acts not connected with the facts constituting the crime for which the accused is being tried cannot be used to prejudice the jury or create a probability of guilt, an apparent exception to this rule exists in cases where knowledge of some particular facts is an ingredient of the crime and must be affirmatively proved, as, for instance, in prosecutions for receiving stolen property: Copperman v. People, 56 N. Y. 591.

It is obvious that in such crimes as receiving stolen property or passing counterfeit money the fact that the property was stolen by someone, or that the crime of counterfeiting was committed by someone, must necessarily be proved as an essential element of the respective crimes.

In some instances the crime is one which is composed of a series of acts, such as unlawful cohabitation or the crime of keeping a

gaming or disorderly house. It may be that in some states the separate acts which go to comprise the crimes just mentioned are not offenses when considered separately, but however that may be, it seems that a series of acts may be shown as ingredients of the offense charged: See Brown v. State, 108 Ala. 18, 18 South. 811; State v. Coffee, 75 Mo. App. 88; State v. Prescott, 33 N. H. 212; State v. Behan, 113 La. 754, 37 South. 714. So, also, in such crimes as subornation of perjury, the fact of the perjury is naturally an essential element of the crime: Stone v. State, 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630. And where defendant was indicted for having, while acting as superintendent of the police department of a large city, received a bribe from a keeper of a house of ill-fame for protecting her in her unlawful occupation, it was held, in State v. Ames, 90 Minn. 183, 96 N. W. 330, that payments of money for a like purpose by other women were admissible. The court said: "It established beyond question a scheme concocted by defendant to put the abandoned women of Minneapolis under tribute to him in return for his official protection, and each and every payment was a part of the one scheme. It was practically one transaction—each act, each payment, an essential part of the whole plan of corruption—and the evidence was competent"; citing Swan v. Commonwealth, 104 Pa. St. 218; Mason v. State, 42 Ala. 532; People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Cobler, 108 Cal. 538, 41 Pac. 401; Mayer v. People, 80 N. Y. 364; People v. Peckens, 153 N. Y. 576, 47 N. E. 883; State v. Eastwood, 73 Vt. 205, 50 Atl. 1077.

And on the trial of a convict for murder in resisting arrest after escape, the state may show the conspiracy among the escaping convicts and also the fact that they were serving sentences for prior crimes: People v. Wood, 145 Cal. 659, 79 Pac. 367. See, also, Williams v. State, 130 Ala. 31, 30 South. 336; Sanford v. State, 11 Ark. 328. The same rule obviously obtains where the punishment is made by the statute more severe in cases where the convicted person has previously been convicted for a felony. And where the scienter or quo animo forms an essential part of the crime charged, evidence is admissible of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent, notwithstanding that they may constitute a different crime in law: State v. Deschamps, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 South. 703. And where fraudulent intent is an element of the crime, similar frauds of the same character and closely connected in point of time are competent evidence to show the intent with which the crime was committed, notwithstanding the fact that they also tend to prove an independent crime: People v. Putnam, 90 App. Div. 125, 85 N. Y. Supp. 1056. In the case just cited the fraudulent scheme consisted in inducing the victim to purchase worthless mining stock from an alleged sick engineer who was represented as being unaware of a rich strike recently made in the mine.

V. Other Offenses as Constituting Part of the Res Gestae.

It would be singular if a person accused of a specific crime could compel the exclusion of important testimony relevant to that crime by having committed two crimes at the same time or nearly so. Such would be the effect if the res gestae could be excluded because its recital would show the commission of an extraneous crime: State v. Folwell, 14 Kan. 105. Hence the rule is that where the evidence of other crimes constitutes a part of the res gestae, it is admissible. The numerous cases upon this branch of the subject merely decide whether the particular facts constitute a part of the res gestae: Oakley v. State, 135 Ala. 15, 33 South. 23; People v. Smith, 106 Cal. 74, 39 Pac. 40; People v. Linares, 142 Cal. 17, 75 Pac. 308; State v. Phillips, 118 Iowa, 660, 92 N. W. 876; State v. Deschamps, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 South. 703; State v. Fontenot, 48 La. Ann. 305, 19 South. 111; State v. Robinson, 112 La. 939, 36 South. 811; Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; People v. Marion, 29 Mich. 31; People v. Nagle (Mich.), 100 N. W. 273; State v. Taylor, 118 Mo. 153, 24 S. W. 449; State v. Perry, 136 Mo. 126, 37 S. W. 804; Britt v. State, 9 Humph. 31; O'Neal v. State, 32 Tex. Cr. Rep. 42, 22 S. W. 25; Hayes v. State, 36 Tex. Cr. Rep. 146, 35 S. W. 983; State v. Burton, 27 Wash. 528, 67 Pac. 1097. A few cases will suffice to illustrate the application of the rule. Thus in a prosecution for assault with intent to kill, evidence of a robbery, committed at the time of the assault is admissible to show the motive for the assault: Durham v. Commonwealth (Ky.), 84 S. W. 533. And on the trial of a mother for the murder of one of her two children by administering morphine to them and also to herself, evidence of the whole transaction is admissible: People v. Quimby, 134 Mich. 625, 96 N. W. 1061. And in a prosecution for perjury committed while testifying before the grand jury relative to the knowledge of the defendant concerning the deposit of a certain sum of money in a deposit vault for the purpose of bribing certain legislators, evidence of the bribery negotiations was held admissible: State v. Faulkner, 185 Mo. 673, 84 S. W. 967. And where, as part of the same transaction in which defendant committed the homicide for which he is being tried, he shot into a house where a third person was at the time, evidence of such shooting was held admissible as part of the res gestae: Bennett v. State (Tex. Cr. Rep.), 81 S. W. 30.

VI. Other Offenses to Show Identity of the Person on Trial.

The rule respecting the use of other offenses as a means of identifying the accused as the perpetrator of the crime on trial was stated in the well-considered case of People v. Molineux, 168 N. Y. 264, 313, 61 N. E. 286, wherein the court said: "Another exception to the general rule is, that when the evidence of an extraneous crime tends to identify the person who committed it as the same person who com-

mitted the crime charged in the indictment, it is admissible. There are not many reported cases in which this exception seems to have been affirmatively applied. A far larger number of cases, while distinctly recognizing its existence, have held it inapplicable to the particular facts then before the court. The reason for this is obvious. In the nature of things there cannot be many cases where the evidence of separate and distinct crimes, with no unity or connection of motive, intent or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. Hence our courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency was not clearly shown."

Hence it is said that proof of another crime should not be admitted for the purpose simply of identifying the defendant unless it be absolutely necessary for his identification: Dabney v. State, 82 Miss. 252, 33 South. 973. In the case just cited it was held in a rape case that evidence of larceny from the house of the prosecutrix was incompetent where the other proof in the case abundantly identified the defendant.

The case of People v. Rogers, 71 Cal. 565, 12 Pac. 679, is an illustration of the rule in this respect. In that case the defendant was being tried for a murder committed while burglarizing the house of the deceased. His identity as the murderer was allowed to be shown in the following manner, viz., that he had gained entrance to the house by means of a knife and chisel, stolen from another house, and had committed the homicide with a pistol stolen from still another house, and that these articles besides certain other articles which were stolen from other houses were found in the woods at a spot near which the defendant was arrested, and that a quilt belonging to the defendant was also found near the other articles. His presence in the vicinity near the burglarized houses was also shown.

The case of Commonwealth v. Choate, 105 Mass. 451, was another instance of the application of the rule. That case was a prosecution for arson committed by means of a box constructed for incendiary purposes. It was shown that other houses were burned in the same manner, that defendant had the ability to make such boxes and that material out of which one box was constructed appeared to be similar to material found in defendant's workshop; that there was a marked similarity between defendant's handwriting and an anonymous letter to the city marshal admitting the burning of certain buildings and threatening the burning of other buildings for the purpose of making

business in the town. The admission of the evidence was strenuously opposed but the appellate court upheld its admissibility.

In Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460, a robbery committed by masked men upon the janitor of a bank, whereby they stole the key to the bank, was followed by a burglary of the bank. Evidence of the burglarization of the bank was allowed on the trial for the robbery in order to identify the robbers. In Musgrave v. State, 28 Tex. App. 57, 11 S. W. 927, the contemporaneous taking of another horse was held no reason for excluding testimony necessary to establish identity in developing the res gestae.

But the fact that defendant committed another robbery very near the same time does not tend to prove that he committed the robbery for which he is being tried, although the fact that defendant was in the locality where the prosecuting witness was robbed would be competent evidence: State v. Spray, 174 Mo. 569, 74 S. W. 846. So, also, where a person is charged with a robbery committed after throwing snuff in the eyes of the victim, the fact that about three weeks previously another robbery upon another person was committed by use of the same means is incompetent to establish the identity of the two robbers as the same person: People v. Romano, 84 App. Div. 318, 82 N. Y. Supp. 749.

VII. Other Offenses as Showing Motive for the Crime Charged.

a. **Distinction Between Motive and Intent.**—Motive has been described as an inferential fact which may be inferred not merely from the attendant and surrounding circumstances, but, in conjunction with these, all previous occurrences having reference to and connected with the commission of the offense: Walker v. State, 85 Ala. 7, 7 Am. St. Rep. 17, 4 South. 686. Ordinarily, intent is an inference of law from acts proved: State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69. Or, as was said in one case, intent in its legal sense is quite distinct from motive. It may be defined as the purpose to use a particular means to effect a certain result while motive is the reason which leads the mind to desire that result: Baker v. State, 120 Wis. 135, 97 N. W. 566. The distinction observed by the Wisconsin court was also approved by the New York court in People v. Molineux, 168 N. Y. 264, 297, 61 N. E. 286. It said: "In the popular mind, intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are

to be found in cases of passing counterfeit money, forgery, receiving stolen property and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill: Therefore intent is of the essence of the crime and previous offenses of a similar character by the same person may be proved to show intent."

b. **Other Offenses as Tending to Show Likelihood of a Motive to Commit the Crime.**—Where a necessity to resort to circumstantial evidence in a criminal case arises, either from the nature of the inquiry or the failure of direct proof, objections to it on the ground of irrelevancy are not favored, for the reason that its force and effect depends upon the connection of the various facts adduced. Consequently much latitude is allowed where the evidence is competent, even though the evidence shows the defendant to be guilty of another crime: Moore v. United States, 150 U. S. 61, 14 Sup. Ct. Rep. 26, 37 L. ed. 997. Besides, as was said in Hendrickson v. People, 10 N. Y. 13, 31, 61 Am. Dec. 721, "considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life." The case of State v. Kent, 5 N. Dak. 516, 67 N. W. 1052, 35 L. R. A. 518, is an instance where remote crimes were allowed to be shown on cross-examination for the purpose of showing that notwithstanding defendant's denial of a motive, he had a motive for the killing of his wife, for which he was on trial. The defendant, who lived under an assumed name, was a man of social position, but had been guilty of embezzlement many years previously, and apprehensive that his wife would discover that fact and expose him to the world.

If the true solution of a mysterious murder case rests largely upon circumstances, the evidence naturally must be allowed to take a wide range. There must, however, be some connection between the fact to be proved and the circumstance in support of it, yet any fact which is necessary to explain another, or which shows facilities or motives for the commission of the crime charged, may be proved, notwithstanding that it also shows the commission of another crime: Jackson v. Commonwealth, 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091.

The cases touching the admissibility of evidence showing merely a likelihood or probability of the defendant having committed the crime with which he is charged, do not always show clearly whether they refer to motive or intent, but we do not apprehend that the rule would be any different in either event. Although the courts

are not harmonious in their expressions as to the admissibility of such evidence, still it seems that the weight of authority is against the admissibility of such evidence. It is quite likely that an examination of the cases in which such evidence was allowed with considerable latitude will disclose that they were prosecutions for sexual offenses. Another apparent exception to the general rule may be said to exist with respect to crimes committed pursuant to a systematic plan or with respect to crimes, the motive or intent of which is susceptible to an innocent explanation.

In People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, the court, in speaking of this phase of the subject, said: "The effect of the argument for the people is that the evidence shows a disposition to commit the crime [bribery]—that is, a criminal disposition. If that is a different view it is equally inadmissible. A man's general character may perhaps be so bad as to permit an inference that evil and good have to him the same meaning, and that it is a matter of indifference by which he accomplishes his purpose. In a judicial proceeding, however, proof of that would be irrelevant, although it show, in a moral sense, that he would be likely to commit the crime with which he was charged. The person charged might as well seek to repel the imputation by proof of particular acts performed by him at other periods of his life, and a cause submitted to a jury be made to turn upon the preponderance of proof, on one side of antecedent bad conduct, and proof, on the other hand, of virtuous acts. Legally speaking, it would be unsafe to draw a conclusion from either."

Likewise in People v. Schweitzer, 23 Mich. 301, the commission of another and distinct offense, though of the same kind as that on trial, was held not admissible for the purpose of rendering it more probable that defendant committed the offense on trial. The court observed that the natural and inevitable effect upon the minds of the jury would be to prejudice them against the defendant, no matter upon what ground or pretense the evidence was received. The same ruling was made in the recent case of Horn v. State (Wyo.), 73 Pac. 705.

The arguments against the introduction of such evidence, together with a dissertation of the French rule to the contrary effect, was made by the court in People v. Shea, 147 N. Y. 78, 41 N. E. 505, adverted to in the fore part of this note.

The rule against the admissibility of evidence of former crimes showing a likelihood or propensity to commit the crime charged was upheld in Bullock v. State, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; State v. Hendrick, 70 N. J. L. 41, 56 Atl. 247; State v. Raymond, 53 N. J. L. 260.

So, also, in Marks v. State (Tex. Cr. Rep.), 78 S. W. 512, in a prosecution for violation of the local option law, evidence that defendant some eight or nine years previously had been indicted

a number of times for such violations was held inadmissible to prove the offense.

But in Stitt v. State, 91 Ala. 10, 24 Am. St. Rep. 853, 8 South. 669, evidence of a former difficulty and threats made in connection therewith were allowed on the part of the prosecution in a trial for murder, although the particulars of the difficulty were not allowed. In this connection see the monographic note on the admissibility of evidence of threats in prosecutions for homicide, attached to State v. Nelson, 89 Am. St. Rep. 691.

And in the principal case (Sykes v. State, ante, p. 972) it will be observed that it was held that other acts of intercourse were allowed in evidence on the ground that they show the relations, the state of intimacy existing between the prisoner and the prosecutrix, and tend to make very probable the commission of the crime charged, namely, carnal knowledge of a girl under the age of consent.

Likewise in State v. Eggleston (Or.), 77 Pac. 738, previous adulteries were held admissible as tending to show the adulterous disposition of the participants. And in Morrison v. State, 40 Tex. Cr. Rep. 473, 51 S. W. 358, which was a prosecution for the murder of defendant's wife, the motive being the marriage of another woman with whom the defendant was infatuated, the court allowed the prosecution to introduce letters and documents which were forged by the defendant in order to facilitate his marriage with the woman with whom he was infatuated, as tending to show his motive, even though some of the forgeries occurred subsequent to the homicide.

c. **Malice as a Motive.**—Very often malice is presumed from the nature of the act, but in some instances it is necessary to affirmatively prove it. Since the proof of malice is, as a general rule, largely dependent upon circumstantial evidence, it naturally follows that any evidence which tends to prove its existence is admissible. Consequently evidence of other crimes or threats are held admissible to prove it: People v. Chaves, 122 Cal. 134, 54 Pac. 596; State v. Deschamps, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 South. 703; State v. Foster, 130 N. C. 666, 89 Am. St. Rep. 876, 41 S. E. 284; Sullivan v. State, 31 Tex. Cr. Rep. 486, 37 Am. St. Rep. 826, 20 S. W. 927. Likewise in prosecutions for libel, it is held that malice may be shown by other libels: Commonwealth v. Harmon, 2 Gray, 289; Commonwealth v. Place, 153 Pa. St. 314, 26 Atl. 620, and in this connection see, also, State v. Heacock, 106 Iowa, 191, 76 N. W. 654.

It seems that the state may offer evidence of malice in a homicide case in addition to the presumption arising from the act itself, without regard to the evidence or defense offered by the accused: Williams v. State, 64 Md. 384, 1 Atl. 887.

In this general connection see the monographic note on the admissibility of threats in prosecutions for homicide, attached to State v. Nelson, 89 Am. St. Rep. 691.

d. Single Motive as Prompting the Commission of Several Crimes. Sometimes it may be said that a single motive prompts the commission of a series of crimes, such as where a series of crimes are committed pursuant to a common plan or system, or where several crimes are committed in order to conceal the evidence of some other crime or where several assaults or homicides are committed in resisting arrest or escaping from confinement after arrest. Of course, in a general way it might be said that all crimes involving larceny are prompted by the same motive, but as we have seen before, previous crimes of that character, are not allowed under our system of jurisprudence to be shown. The apparent exceptions, mentioned above, are crimes resulting from specific motive as contradistinguished from a general motive or criminal occupation.

Thus in Stone v. State, 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630, evidence as to what the defendant said and did in suborning the daughters was held relevant on the trial of defendant for subornation of the mother, as showing the motive and as part of the scheme to acquit the person upon the trial of whom the perjured testimony was used. In Whitney v. Commonwealth, 24 Ky. Law Rep. 2524, 74 S. W. 257, in a prosecution for murder committed while defendant was burglarizing a house, evidence of other burglaries committed just prior to entering the house where the homicide was committed were allowed as showing the motive of the entry into the house. The court also assigned another reason for the allowance of the evidence, namely, the purpose of identifying the parties. The latter reason would appear to us as the more sound reason for the admissibility of the evidence.

In State v. Heacock, 106 Iowa, 191, 76 N. W. 654, which was a prosecution for libel, subsequent libelous publications were allowed in evidence for the purpose of showing the malicious motive of the defendant in publishing the libels for which he was being tried.

e. Concealment of a Crime or the Evidence Thereof as a Motive. Where the motive with which the crime for the commission of which the defendant is being tried was the concealment of some other crime by either destroying the evidences of the crime or the killing of witnesses who could testify relative to it, the evidence of such motive is admissible, even though it does show the commission of an extraneous crime.

Thus in Blackwell v. State, 29 Tex. App. 194, 15 S. W. 597, which was a homicide case, the prosecution were allowed to show that the defendant had robbed a house and burned the house to destroy the evidence of his larceny, and that while escaping from the scene of his theft and arson, he met the deceased, whom he thereupon killed. The facts in the case would appear to have all been part of the res gestae.

And in Smith v. State, 44 Tex. Cr. Rep. 53, 68 S. W. 267, on a trial for murder, it was held competent as tending to show defendant's motive and desire to get rid of deceased that defendant had admitted to deceased that he was engaged in counterfeiting, but testimony in regard to the details of his counterfeiting were not allowed.

While in State v. Kline, 54 Iowa, 183, 6 N. W. 184, which was a prosecution for an attempt to murder, the prosecution were allowed to show that the defendant had seduced the prosecutrix, had urged her to allow an abortion to be performed, which she had refused, and finally that she was delivered of a child.

The case of People v. Harris, 136 N. Y. 423, 33 N. E. 65, involved a great amount of circumstantial evidence relative to defendant's guilt of the homicide of the deceased, whom he had secretly married. The prosecution was allowed to show that defendant had secretly married other women also from whom he was not divorced.

f. Resistance to Arrest as a Motive.—Where the offense, such as a homicide or deadly assault with which the defendant is charged, was committed while the defendant was resisting arrest, evidence of his participation in the crime for which the arrest was being made is admissible to show that the motive was resistance to arrest or a desire to escape the penal consequences of his crime: People v. Wilson, 117 Cal. 688, 49 Pac. 1054; State v. Rudolph (Mo.), 85 S. W. 584.

Very often, however, the evidence of the resistance to arrest or escape from confinement is allowed to be shown in the prosecution of the original offense as tending to prove guilty knowledge or intent. See the discussion under the next subdivision.

VIII. Other Offenses as Showing Intent of Act Charged as a Crime.

a. In General.

1. Establishment of Intent in General.—Criminal intent is naturally an essential ingredient of all common-law crimes, though there are a few purely statutory crimes in which the act itself constitutes the crime regardless of the intent of the actor. There are, of course, cases in which the intent may be inferred from the nature of the act while in other cases such intent must be affirmatively proved: People v. Molineux, 168 N. Y. 264, 61 N. E. 286. The intentions of men, it is said, can only be determined from their acts: Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898.

The general rule with respect to the admission of evidence of other crimes was expressed by the court in People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, in the following language: "Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally

done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain: Regina v. Roden, 10 Moak, 511; Regina v. Cotton, 5 Moak, 479; Regina v. Geering, 18 L. J. M. C. 215; Regina v. Garner, 3 Fost. & F. 681; Rex v. Voke, Russ. & R. 531; Stout v. People, 4 Park. C. C. 71; Osborne v. People, 2 Park. C. C. 583; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; Pierson v. People, 18 Hun, 239; State v. Watkins, 9 Conn. 47, 21 Am. Dec. 712; Commonwealth v. Blair, 126 Mass. 40; Commonwealth v. Corkin, 136 Mass. 429; Weed v. People, 56 N. Y. 628; Hays v. State, 40 Md. 633; Regina v. Dale, 16 Cox C. C. 703."

In the leading American case on this subject (State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69), it was held that the prosecution cannot give evidence of other crimes of the defendant unless they are so connected by circumstances with the particular crime at issue that the proof of one fact with its circumstances has some bearing upon the issue at trial.

Hence it is said that intent may be proved by competent and pertinent evidence, even though the proof incidentally shows the commission of other offenses: Crum v. State, 148 Ind. 401, 47 N. E. 833; State v. Behan, 113 La. 754, 37 South. 714; State v. Kelley, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203. But distinct crimes not connected with that on trial cannot be proved against the accused to raise a presumption of guilt, on the ground that being depraved enough to commit one crime he may therefore be presumed to have committed the crime for which he is being tried; but, on the other hand, where the facts and circumstances amount to proof of another crime, and there is ground to believe that the crime charged grew out of it or was in any way caused by it, such facts and circumstances are admissible to show the quo animo of the accused: Commonwealth v. Ferrigan, 44 Pa. St. 386. See, also, People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, to the same effect.

It is often difficult to determine the degree of relevancy which entitles the prosecution to introduce evidence showing the commission of other crimes, but much of the difficulty with reference to such evidence would disappear if the evidence were considered strictly upon the ground of its relevancy to the purpose for which it is sought to be introduced, regardless of the fact that it may incidentally show the commission of some other offense. In other words, there ought not to be any more difficulty in deciding the relevancy of such evidence than there would be if the circumstance of some other offense appearing did not appear.

In a recent case in Texas—that of Barnett v. State, 44 Tex. Cr. Rep. 592, 100 Am. St. Rep. 873, 73 S. W. 399—it was sought to draw a distinction with respect to the introduction of previous acts of intercourse in a prosecution for rape of a girl under the age of consent, the court, however, held that such evidence was admissible where it tends to solve some disputed fact or issue in the case, or, in other words, that there is no difference in the introduction of testimony as to other offenses between a case of rape and any other criminal charge.

2. **To Corroborate or Explain the Intent or Characterize the Act.**—It seems that evidence showing the commission of other offenses is quite frequently admitted on the ground that it tends to corroborate or explain the intent of the accused, but it would seem that the admission of such testimony is likely to come very near the border line of evidence tending to show merely a probability that the accused committed the crime or that he had a criminal disposition: See subdivision VII, b.

The status of such evidence was shown in the case of State v. Kelley, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203, which was a prosecution for larceny. It seems that the only direct evidence for the state consisted in the narrative of an accomplice, which, with respect to the act set forth in the indictment, left room for a reasonable doubt as to the felonious participation of the defendant. The court held that his participation could be established by other portions of the narrative showing that, on the same expedition during which the larceny was alleged to have been committed, he had actively engaged in abstracting other personal property from various places, and by the testimony of the owners of the stolen articles, that they were in the places from which the accomplice asserted them to have been taken, and were missed about the time at which the accomplice said the expedition took place, and that they were afterward found and identified on defendant's place. But the court held that evidence of a larceny committed by the defendant and his accomplice during a second expedition, undertaken upon the renewal of a purpose entertained before the first expedition, had no legitimate tendency to support the charge, and should be excluded.

So, also, in Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. Rep. 292, 35 L. ed. 1076, on a trial of a person indicted for murder, it appeared in evidence that the murder followed an attempt to rob. The court held that the evidence that the defendant had committed other robberies in that neighborhood on different days before the time of the murder was inadmissible, and likewise in Shepherd v. Commonwealth (Ky.), 85 S. W. 191, the court held in a homicide case that evidence that defendant had committed other crimes; that he had possibly been guilty of adultery; that he had shot another man or said that the deceased was the third man that he had shot—

was inadmissible. And in People v. Peck (Mich.), 103 N. W. 178, which was a prosecution for embezzlement, it was held improper to permit the prosecuting witness to state that receipts in other transactions were forgeries, and that on an accounting between defendant and the witness that they were disallowed as credits on the claim that they were forgeries.

The cases involving prosecutions for sexual crimes seem to form a class in which the use of evidence showing other offenses, particularly offenses of a similar character, are peculiarly useful in corroborating the evidence presented on behalf of the prosecution. It appears, however, that the evidence, in those cases is used more for the purpose of showing that the act occurred as alleged or characterizing the act, than the showing of the intent of the accused in the perpetration of the act.

Thus in the principal case (Sykes v. State, ante, p. 972), it was held that in a prosecution for sexual intercourse, in violation of an age of consent statute, that evidence of both prior and subsequent acts of a like nature by the parties was admissible in corroboration or explanation of the act relied upon for conviction. See, also, State v. Lancaster (Idaho), 78 Pac. 1081; State v. Scott, 172 Mo. 536, 72 S. W. 897, to the same effect.

But it seems that a prosecuting witness in a statutory rape case cannot corroborate her testimony by testifying to subsequent acts: Smith v. State (Tex. Cr. Rep.), 73 S. W. 401.

In Cross v. State, 78 Ala. 430, which was a prosecution for adultery, it was said that proof of acts anterior to the time covered by the indictment could be adduced to explain or throw light upon other acts of a like nature within such period, or, as is sometimes said, for the purpose of proving an adulterous disposition in the persons inplicated. In this connection see, also, Brevaldo v. State, 21 Fla. 789, which was a prosecution for living in open adultery.

So, also, in Lefforge v. State, 129 Ind. 551, 29 N. E. 34, on a trial for incest, previous acts of familiarity between the parties were said to be admissible, although they culminated in sexual intercourse. Likewise, in People v. Schilling, 110 Mich. 412, 68 N. W. 233, in a prosecution for bastardy, evidence of other acts of intercourse was held admissible as bearing upon the probability of the particular act having occurred as alleged.

3. **Admissibility Where Criminal Intent is Deducible from the Act Itself.**—Proof of another robbery is not admissible in a robbery case for the purpose of showing intent, since the facts constituting the offense on trial are sufficient evidence of the intent in itself without the use of extraneous evidence on that point: State v. Spray, 174 Mo. 569, 74 S. W. 846.

In People v. Lonsdale, 122 Mich. 388, 81 N. W. 277, which was a prosecution for manslaughter by reason of having committed an abortion, evidence was introduced tending to show that the defend-

ant had been guilty of another abortion for the purpose of showing guilty knowledge or intent. The court said: "This case does not form an exception to the general rule of evidence. Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue. Upon the record, there is no room for an inference that death resulted from accident, or that the operation was performed to save the life or health of the deceased. On the contrary, if the jury found that the dying declaration of the deceased was true, the crime was complete, and the jury could not find otherwise than that it was done with guilty knowledge and intent. This testimony should have been excluded, and for this reason the conviction must be set aside."

4. **Admissibility Where an Innocent Intent may be Deduced from the Act.**—In certain classes of offenses a criminal intent is not inferable from the commission of the act charged, and the act standing as an isolated instance might be claimed to be the result of honest mistake. In such instances the intent with which the act was performed is an essential issue, and it would seem that the burden would be on the prosecution to prove that a criminal intent existed. In many cases, however, the evidence of other acts of a similar character is used by the prosecution to rebut the defense of accident or mistake set up by the defendant.

The general view of these cases was illustrated by the court in People v. Molineux, 168 N. Y. 264, 61 N. E. 286, wherein the court said: "There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property and obtaining money under false pretenses. An innocent person may, in a single instance, pass a counterfeit coin or bill. Therefore intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent: Commonwealth v. Jackson, 132 Mass. 16; Commonwealth v. Bigelow, 8 Met. 235; Commonwealth v. Stone, 4 Met. 43; Helm's Case, 1 City Hall Rec. 46; Smith's Case, 1 City Hall Rec. 49; Coffey's Cases, 4 City Hall Rec. 52; Dougherty's Case, 4 City Hall Rec. 166. So in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense, and scienter may be proven by other previous similar acts: Commonwealth v. Johnson, 133 Pa. St. 293, 19 Atl. 402; Coleman v. People, 58 N. Y. 555; Copperman v. People, 56 N. Y. 591; People v. McClure, 148 N. Y. 95, 42 N. E. 523. In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time that the instrument described in the indictment was forged or uttered, the defendant had passed, or had in his possession, similar forged instruments, as it tends

to prove intent: Commonwealth v. Russel, 156 Mass. 196, 30 N. E. 763; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; Regina v. Coleclough, 15 Cox C. C. 92. On the trial of an indictment for obtaining goods by false representations similar representations made by the defendant to creditors from whom goods had been previously purchased by him were held admissible to prove intent: Mayer v. People, 80 N. Y. 364. It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act."

Hence it will be seen that where the circumstances of the case are such that guilty knowledge must be shown, it becomes an issue of the case, and evidence of other crimes tending to show such knowledge is admissible, but that where from proof of the falsity of the statements or the nature of the acts, the inevitable inference is that they were made for a fraudulent purpose, evidence of other crimes for that purpose is not admissible: Jackson v. People, 18 Ill. App. 508.

Of course evidence of other distinct crimes is not admissible to raise an inference of guilt of the crime on trial, but such evidence, as we have seen, is admissible to show the guilty knowledge, intention or bad faith of the defendant, and especially so where there is a question whether the act was accidental or intentional, since the fact that the act formed part of a series of similar occurrences in each of which the defendant was concerned, is relevant as characterizing the act: State v. Brady, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290, 36 L. R. A. 693.

The rule is applied in numerous cases. Thus in Knights v. State, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508, evidence that on the night the arson charged was committed the defendant had set fires in other buildings was held admissible; the court saying: "The state was not only required to go further and satisfy the jury that the act was intentional and not accidental. The effect of the evidence was properly limited by an instruction, and its submission to the jury was not legally prejudicial." Likewise in trials for embezzlement, evidence of other contemporaneous acts of a similar character were held admissible to show intent or rebut the defense of accident or mistake: Lang v. State, 97 Ala. 41, 12 South. 183; United States v. Russell, 19 Fed. 591. So, also, in forgery cases: See People v. Bird, 124 Cal. 32, 56 Pac. 639; People v. McGlade, 139 Cal. 66, 72 Pac. 600; State v. Minton, 116 Mo. 605, 22 S. W. 808; Mallory v. State, 37 Tex. Cr. Rep. 482, 66 Am. St. Rep. 808, 36 S. W. 751; Howard v. State, 37 Tex. Cr. Rep. 497, 66 Am. St. Rep. 812, 36 S. W. 475. And also, as was shown before, such evidence is particularly apropos in prosecutions for the passing of counterfeit money: State v. Van Houten, 3 N. J. L. 248, 4 Am. Dec. 407; Reed v. State, 15 Ohio, 217; Bryan v. United States, 133 Fed. 495.

And likewise in prosecutions for fraud, the proof, as a rule, being of a circumstantial nature from the very nature of the crime, such evidence is often very relevant and hence admissible: Reeves v. State, 95 Ala. 31, 11 South. 158; People v. Wasservogle, 77 Cal. 173, 19 Pac. 270; Du Bois v. People, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658; Commonwealth v. Jackson, 132 Mass. 16; State v. Myers, 82 Mo. 558, 52 Am. Rep. 389; People v. Hughes, 91 Hun, 354, 36 N. Y. Supp. 493; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551.

It is frequently said that evidence of other crimes is admissible to rebut a possible inference of innocent intention, or rebut a defense based on evidence, tending to show an absence of guilty knowledge or intent, or to impeach a witness on behalf of the defense where such impeachment is material.

Thus in a prosecution for homicide alleged to have been performed by setting fire to the deceased, it was held that the prosecution could show a previous attempt by an apparent accident of throwing a burning paper used in lighting a pipe: Commonwealth v. Birriolo, 197 Pa. St. 371, 47 Atl. 355. And where the defendant admits the act—for instance, the commission of an abortion—but claims that it was done under a necessity, proof of other acts was held admissible to prove his intent: Clark v. Commonwealth, 111 Ky. 443, 63 S. W. 740; People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203.

Likewise it is permissible to rebut the explanation given by the defendant on a charge of receiving stolen property by showing other offenses: Turner v. State, 102 Ind. 425, 1 N. E. 869. And it was held in a recent case in New York in a prosecution for receiving stolen property that where young boys sell hides for a grossly inadequate price to the defendant, other purchases of hides from such boys are admissible, even though the hides bought on the other occasions were stolen from different owners than the owner of the hides concerned in the transaction on trial: People v. Doty, 175 N. Y. 164, 67 N. E. 303.

So, also, where defendant, as a witness, testifies on his trial for a violation of the local option law that he had never sold liquor except on prescription, and on cross-examination stated that he never sold any liquor to three named persons, not mentioned in the indictment, the prosecution may show in rebuttal that he had done so: Gilmore v. State, 37 Tex. Cr. Rep. 178, 39 S. W. 105.

And it is also held that where a witness testifies to the good reputation of the defendant, he may be questioned on cross-examination whether he had ever heard that the defendant was accused of certain offenses for the purpose of ascertaining the weight to be given to his testimony, but the rule is not approved by all of the courts: See monographic note to People v. Bonier, 103 Am. St. Rep. 893. See, also, State v. Sterrett, 71 Iowa, 386, 32 N. W. 387; King v. United States, 112 Fed. 988, 50 C. C. A. 649.

5. Admissibility Where the Act Itself Constitutes the Crime Regardless of the Intent.—Evidence of other crimes for the purpose of establishing a guilty intent is not admissible where the very ground upon which the prosecution relies for a conviction is that a performance of the acts mentioned in the statute constitutes a crime regardless of any fraudulent intent, as, for instance, on trial for violation of a statute making it unlawful for a person not an officer to mutilate or destroy a public record: People v. O'Brien, 96 Cal. 171, 31 Pac. 45. See, also, State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69.

Thus where defendant was indicted for manslaughter in killing his infant son with a chisel "in the heat of passion, and without a design to effect death," it was held that it was improper to admit proof that the defendant had been in the habit of striking the boy and kicking him, since there was no issue as to the purpose or intent with which the act was done: Albricht v. State, 6 Wis. 74.

6. Admissibility Where Defendant Admits Criminal Intent if His Connection With the Act on Trial is Proved.—Several courts have substantially held that where the defendant admits in open court that the intent of the act charged against him is criminal, although denying participation in the act, that evidence of other crimes for the purpose of proving intent is thereby rendered inadmissible, but the rule thus laid has also been denied.

Thus in State v. Vance, 119 Iowa, 685, 94 N. W. 204, it was held in a prosecution for lewdness where defendant admits in open court and before the jury that if the facts charged were in fact done they were done designedly and not through accident or inadvertence, that it was error for the court to admit evidence of similar acts done in the presence of other parties for the purpose of showing intent. Likewise in State v. Bokien, 14 Wash. 403, 44 Pac. 889, in a prosecution for obtaining goods under false pretenses by the use of checks upon banks in which defendant had no funds, the defendant admitted that he signed the checks and obtained the goods, but claimed that he had informed the payee of the checks that he had no funds at the bank at the time to meet the checks, but that he would see that the checks would be paid. The prosecution attempted to show several other transactions in which he had issued checks under like circumstances, but the court held that the question of criminal intent or guilty knowledge was not in issue, and that there was only one question in the case, namely, whether defendant made the statements claimed respecting the absence of funds to meet the checks.

But in Higgins v. State, 157 Ind. 57, 60 N. E. 685, which was a prosecution for soliciting a bribe, a contrary rule was announced. The court in discussing the competency of certain testimony that the defendant had on a previous occasion solicited a bribe, said: "It is said that the language used was not equivocal, and the jury had

the right to infer therefrom the intent charged. While this may be true, it does not render other proof of such intent or motive incompetent. When a fact is to be proved, the law requires the best evidence attainable, but it does not put any limit upon the amount of proof that may be adduced: Thomas v. State, 103 Ind. 419, 434, 2 N. E. 808.

"It is insisted, however, by appellant that 'he did not attempt to avoid criminal responsibility by relying upon the lack of intent or want of guilty knowledge,' but because he stated, when said evidence was offered as a part of the objection thereto, that he would 'deny ever having had the conversation which is alleged to have taken place with the witness, David M. Parry.' It is true that appellant made the statement claimed as a part of his objection to said evidence. When the same was offered, but such statement did not relieve the state from the burden of proving the criminal intent charged in the indictment. What right had the trial judge, when said statement was made, to say that the criminal intent charged was thereby conclusively established, if the conversation took place? To have so prejudged the case would have been an invasion of the province of the jury. Even if appellant had admitted the criminal intent charged, if the conversation occurred, or that he was guilty as charged if he had such conversation, the admission of the evidence complained of would not have been error. We do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial."

The reasoning of the court in Commonwealth v. Miller, 3 Cush. 243, was to the same effect. In that case it was held that an admission that defendant passed the notes alleged to have been forged and that if they were not genuine that defendant knew it, did not preclude evidence of the passing of other notes of a like character. The ruling in State v. Flynn, 124 Mo. 480, 27 S. W. 1105, has a general bearing to the same effect.

7. **Admissibility Where the Intent may be Shown Otherwise than by Other Offenses.**—It seems that where the purpose for which it is sought to introduce evidence showing the commission of other crimes can be accomplished by other evidence that such evidence will not be allowed under that pretense: People v. Schweitzer, 23 Mich. 301.

In Regina v. McDonnell, 5 Cox C. C. 153, in a prosecution for threatening to accuse the prosecuting witness of an infamous crime with intent to extort money, it was proved that the accused approached the witness while in an urinal and said to him: "If you do not give me a sovereign I will charge you with an indecent assault." The court refused to allow evidence of a previous offense of a like character by the accused, saying: "If the prosecutor is

believed, the intent is quite manifest, and therefore it is unnecessary to call other witnesses for the purpose of confirming it."

But in State v. Johnson, 111 La. 935, 36 South. 30, it was held to be competent for the state to prove that a person charged with the commission of a crime was seen in the vicinity where the crime was committed shortly after or before the event, and that the circumstance that when so seen he was engaged in the commission of another crime was not sufficient to exclude the evidence if it was otherwise admissible.

b. Common Plan, Scheme or System Indicating Intent.—Where the offense with which the defendant is charged was consummated by a trick, fraud or a system of acts or representations, antecedent acts or transactions are admissible to show the criminal intent or guilty knowledge of the defendant: Rafferty v. State, 91 Tenn. 655, 16 S. W. 728. The reason for this rule is based on the idea that one who commits a series of acts bearing close similarity and connection with each other and clearly evincing a similar intention in each, has in all likelihood the same intent in another act of the same nature and clearly connected with such series: Baker v. State, 120 Wis. 135, 97 N. W. 566. Even though two transactions claimed to be part of a system of confidence games differ in details, still they are admissible where similar in general outline: State v. Jackson, 112 Mo. 585, 20 S. W. 674. In this connection see Du Bois v. People, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658, for a series of swindling transactions with respect to worthless mining stock in which the details were varied somewhat.

After a conspiracy to commit a series of crimes similar to the one in trial has been shown, evidence of acts of one of the co-conspirators may be shown to establish the intent: State v. Spalding, 19 Conn. 233, 48 Am. Dec. 158. The above rule was applied in a counterfeit case.

So, also, in a forgery prosecution, other forgeries may be shown if they tend to show that the accused had adopted the same plan to utter forged instruments in other cases as in the case on trial: McGlasson v. State, 37 Tex. Cr. Rep. 620, 66 Am. St. Rep. 842, 40 S. W. 503, and on a trial for burglary of a freight-car, evidence of both prior and subsequent burglaries, and of the character and kind of articles taken and afterward found concealed on the premises of the accused, was held admissible as tending to show a regular system of crime organized and carried on by a band of criminals of which the accused was one: Dawson v. State, 32 Tex. Cr. Rep. 535, 40 Am. St. Rep. 791, 25 S. W. 21.

But in a prosecution for horse theft, evidence of other and different thefts by an accomplice at other, and different times was held inadmissible unless a regular system was shown: Buck v. State (Tex. Cr. Rep.), 83 S. W. 390.

So, also, where the defendant is being prosecuted for obtaining money under false pretenses by having sold tickets to an advertised exhibition as a mesmerist and after having sold a large number of tickets absconded. Evidence of other tickets sold at the same time is admissible: State v. Sarony, 95 Mo. 349, 8 S. W. 407. Likewise, in prosecutions for embezzlement, other items collected but not accounted for are admissible: People v. Bidleman, 104 Cal. 608, 38 Pac. 502; People v. Van Ewan, 111 Cal. 144, 43 Pac. 520; Jackson v. State, 76 Ga. 551; People v. Hawkins, 106 Mich. 479, 64 N. W. 736. The same rule was applied in a prosecution of an overseer of poor for defrauding the county by filing fraudulent claims: State v. Brady, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290, 36 L. R. A. 693. And in a prosecution of an insurance solicitor for making false pretenses to the state agent in respect to the bona fides of a fictitious application for insurance, upon the basis of which he obtained an advance on the commission accruing to him, evidence of details of similar fictitious applications in furtherance of an alleged advertising scheme was held competent upon the question of intent: State v. Seligman (Iowa), 103 N. W. 357.

So, also, in prosecutions for arson. Other fires related in plan and execution are held admissible: People v. Zucker, 20 App. Div. 363, 46 N. Y. Supp. 766, affirmed in 154 N. Y. 770, 49 N. E. 1102; Rafferty v. State, 91 Tenn. 655, 16 S. W. 728. System is also allowed to be shown in prosecutions for violation of local option laws: Hollar v. State (Tex. Cr. Rep.), 73 S. W. 961; Roach v. State (Tex. Cr. Rep.), 84 S. W. 586. But it is said that simple straight sales for money to various parties cannot constitute a system, but merely evidence a wanton continuous violation of law and hence are not admissible: Belt v. State (Tex. Cr. Rep.), 78 S. W. 933.

c. **Subsequent Offenses as Evidencing Intent.**—Although the decisions are not uniform as to the admissibility of subsequent offenses, still it seems that evidence of subsequent offenses will not be excluded merely because of occurring subsequent to the commission of the crime on trial where such evidence is otherwise competent and relevant. Perhaps the main reason why much evidence of that character is held inadmissible, lies in the fact that such subsequent acts frequently are not relevant to the question of motive, intent or identity.

The general theory regarding the admissibility of such subsequent offenses was well shown in Farris v. People, 129 Ill. 521, 16 Am. St. Rep. 283, 21 N. E. 821, 4 L. R. A. 582, which was a prosecution for a homicide and in which it was sought to introduce evidence of the commission of a rape upon the wife of the deceased subsequent to the homicide. The circumstances of the homicide were shown by ample evidence. The court after adverting to the necessity for a logical connection between evidence of other offenses and the offense on trial said: "In this case it must be borne in mind that

there is no evidence whatever connecting the two acts, intending to show wherein the commission of the rape had any bearing upon or tendency to explain the commission of the homicide, and therefore, if it be held that evidence of the one tended to prove the other, it must be upon the ground that there is some natural or obvious connection between the two acts. Did the proof of rape in this case tend to prove defendant guilty of murder? What element in the crime of murder was wanting when this evidence was admitted, or what fact in evidence necessary to make out the crime of murder did it tend to strengthen or corroborate? It seems clear to us that these are questions which puzzle the legal mind, and can only be answered so as to sustain the admissibility of the evidence in question, if at all, by drawing exceedingly fine distinctions.

"To the other question—Was it not evidence calculated to inflame the minds of the jury, and prejudice them against the defendant, rather than prove him guilty of murder?—the answer is obvious. It is insisted that the object was to show a motive, and for that purpose the learned judge held it competent. In the first place, under the facts proved, it was not necessary to prove a motive. In cases of doubt as to whether the party charged did the criminal act, proof of motive is important and often decisive; but in this case, the state having shown the deliberate shooting, under circumstances showing both express and implied malice, proof of motive was not necessary to a conviction; and while the prosecution doubtless had the right to add that proof by competent evidence, it may well be doubted whether testimony so strongly calculated to prejudice the jury against the defendant should have been admitted, even though it tended to prove a motive, such proof not being necessary to the case."

It is principally where systematic crime is an element in the proof constituting intent that subsequent offenses are allowed to be shown. The rule in those cases was shown in Hennessy v. State, 23 Tex. App. 340, 5 S. W. 215, which was a prosecution for forgery in altering an authenticated account against the state for supplies furnished to state senators. The court in that case approved the rule laid down by Mr. Wharton in his work on Criminal Evidence, section 38, wherein he says: "When the object is to show system, subsequent, as well as prior offenses, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is. The time of the collateral inculpatory facts is immaterial, provided they be close enough together to indicate that they are part of a system."

The above rule was applied in Dawson v. State, 32 Tex. Cr. Rep. 535, 40 Am. St. Rep. 791, 25 S. W. 21, in a prosecution for burglary of a freight-car, a system and series of such burglaries being allowed to be shown.

It is also applied in prosecutions for forgeries made pursuant to a plan: McGlasson v. State, 37 Tex. Cr. Rep. 620, 66 Am. St. Rep. 842, 40 S. W. 503. But the subsequent offense should not be too remote. Thus in People v. Baird, 104 Cal. 462, 38 Pac. 310, upon a trial of an indictment for forgery, evidence of the forgery of other instruments, nine months after the forgery on trial was held too remote to be admissible. The court said: "This is a dangerous kind of evidence at best. It is an exception to the well-established rule that evidence of other crimes cannot be introduced to help along a conviction of the crime charged; and it should not be carried any further than courts have already carried it. No case has been cited which would justify the contention of respondent on this subject in the case at bar."

So, also, under an indictment for obtaining money under false pretenses in selling certain goods as being goods of a certain manufacture, evidence of other sales subsequent to the indictment was held inadmissible, and was held sufficiently prejudicial to warrant a new trial: State v. Letourneau, 24 R. I. 3, 96 Am. St. Rep. 696, 51 Atl. 1048. Likewise in a prosecution for selling liquor on Sunday, subsequent sales on Sunday were held inadmissible, the court saying: "It was no part of a system, nor did it show system in the commission of the offense." And in a prosecution for a seditious libel, it was held incompetent for the purpose of proving intent in the publication, to give in evidence any papers subsequently published by the defendant or found in his possession which would be libels if published.

But in Morrison v. State, 40 Tex. Cr. Rep. 473, 51 S. W. 358, forgeries committed after the murder of the defendant's wife, with whose murder he was charged, were held admissible to prove defendant's motive, and in State v. Wilson, 72 Minn. 522, 75 N. W. 715, which was a prosecution for swindling by a sham bet regarding the ability of a confederate to open a padlock, which could be opened by a secret spring, the court allowed the prosecution to show that a person who personated an officer appeared on the scene and arrested the parties but released them after the victim had paid the supposed officer a bribe for that purpose, since the whole was a system.

Prosecutions for sexual crimes appear to belong to a class of offenses in which subsequent offenses are frequently allowed to be shown. Thus in the principal case (Sykes v. State, ante, p. 972) it was held competent to introduce evidence of both prior and subsequent acts of a like nature in corroboration or explanation of the act relied upon for conviction, or for the purpose of showing the relation and mutual disposition of the parties or guilty knowledge or intent of the accused.

As tending to sustain the above rule, see Alsabrook v. State, 52 Ala. 24 (though State v. Crowley, 13 Ala. 172 and Pope v. State, 137

Ala. 56, 34 South, 840, have a contrary tendency); Crane v. People, 168 Ill. 395, 48 N. E. 54; State v. Williams, 76 Me. 480; State v. Kavanaugh, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842; State v. Robertson, 121 N. C. 551, 28 S. E. 59; Burnett v. State, 32 Tex. Cr. Rep. 86, 22 S. W. 47, but in Smith v. State (Tex. Cr. Rep.), 73 S. W. 401, it was held in a prosecution for statutory rape that evidence of acts of intercourse committed subsequent to the offense set forth in the indictment is inadmissible to corroborate the other testimony in the case, the court saying: "It could not be corroboration of the prosecutrix for her to testify to one rape and then corroborate this fact by testifying to another rape. There is no rule of law supporting the proposition that a witness can corroborate herself by swearing to one fact and then swearing to another fact and insisting that such other fact was corroboration of the previous statement." But in State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124, subsequent acts of adultery were held admissible in a prosecution for adultery to the relation and disposition of the parties.

In Commonwealth v. Horton, 2 Gray, 354, subsequent acts of adultery were held inadmissible; but see Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110, to a contrary effect, although the latter is a divorce case. Likewise in People v. Fowler, 104 Mich. 449, 62 N. W. 572, subsequent acts in sexual crimes were held inadmissible. It seems that subsequent offenses tending to show an admission of guilt are admissible. Thus in State v. Alexander (Mo.), 83 S. W. 753, in a prosecution for robbery, evidence of efforts of the defendant to induce the prosecuting witness not to appear and testify was held admissible as tending to show guilt. The purpose of the evidence was not clearly shown; the court, however, said: "That anything done by the defendant indicating that he did not want the prosecuting witness to be present at the trial against him or to tell what he knew of the facts connected with the alleged robbery, whether his acts or conduct amounted to the commission of the offense of bribery or not, was at least competent as a circumstance tending to show the consciousness of guilt on the part of the defendant."

Likewise, a letter written by the accused tending to show an attempt to manufacture or suggest statements that a witness should testify to in his interest is competent against the accused: State v. Register, 133 N. C. 746, 46 S. E. 21.

And attempts to conceal the evidences of the crime on trial, such as burning a building to conceal the evidence of the breaking into the building, are admissible: Roberson v. State, 40 Fla. 509, 24 South. 474. So, also, resistance to arrest is admissible: State v. Mulholland, 16 La. Ann. 376.

Likewise, attempts to escape from being arrested or attempts to escape from the scene of the crime by means of a disguise, or attempts to break jail after arrest, are admissible as tending to

ilty knowledge or intent: Cordova v. State, 6 Tex. App. 207; v. Place, 157 N. Y. 584, 52 N. E. 576; Williams v. State, 15 p. 104; State v. Sanders, 76 Mo. 35; Anderson v. Common-100 Va. 860, 42 S. E. 865.

moteness of Time of Prior Offenses as Affecting Intent.—he criminal acts attempted to be shown are connected with se on trial as part of a systematic plan, the time when s occurred is immaterial, provided that they are close together to indicate that they are part of a system: Mason , 31 Tex. Cr. Rep. 306, 20 S. W. 564.

o, it is said that it is always competent to show that the nt had made an attempt at some prior time, not too remote it the same offense. Thus in a prosecution for rape it was mpetent to prove an attempt to commit the same crime upon e woman a short time prior thereto, but not that he had at-d to commit a rape upon some other woman: People v. O'Sul-104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880. And on a tion for violation of the local option law it was held im-to allow the state to prove that six or eight months prior, fendant had pleaded guilty to a similar offense: Lee v. State Cr. Rep.), 73 S. W. 407.

Admissibility of Convictions of Other Offenses for Purposes f Impeachment or of Affecting the Credibility of a Witness.

e general rule in this respect was set forth in Paulson v. State, Wis. 89, 94 N. W. 771, in the following language: "Proof of ile acts of crime or misconduct is generally not admissible for achment: Roscoe's Criminal Evidence, 11th ed., pp. 95, 142; v. Layer, 16 How. St. Tr. 285; Commonwealth v. O'Brien, Mass. 342, 20 Am. Rep. 325; Carthaus v. State, 78 Wis. 560, 47 7. 629; Emery v. State, 101 Wis. 627, 650, 78 N. W. 145. It ly by virtue of statute that the fact of previous conviction is ception to that rule: See Rev. Stats. 1898, sec. 4073, note; e's Criminal Evidence, p. 95. That statute permits no other tion than proof of the fact of conviction, and permits that proof by cross-examination of the witness himself, or by the record. trial court permitted proof of various specific facts tending to de the defendant, other than the mere fact of conviction, and itted that proof to be made by parol evidence from witnesses than accused. This, as already stated, could not have been by way of impeachment; hence the error was in no wise cured aived by the fact that defendant took the stand, and thereby cted himself to proper impeaching evidence."

nce, we see that the matter is regulated by the statutes of the al states. The question arose in the following cases: People v. r, 75 Cal. 383, 17 Pac. 431; State v. Carter, 121 Iowa, 135, 96 N. 10; State v. Ronk, 91 Minn. 419, 98 N. W. 334; Rosenweig v.

People, 63 Barb. 634; People v. Greenwall, 108 N. Y. 301, 2 Am. St. Rep. 415, 15 N. E. 404; Clark v. State, 38 Tex. Cr. Rep. 30, 40 S. W. 992; Lee v. State (Tex. Cr. Rep.), 73 S. W. 407; Wesley v. State (Tex. Cr. Rep.), 85 S. W. 802.

X. Admissibility of Conviction or Acquittal of Other Offense as Substantive Evidence.

The general principles of law respecting the admissibility of evidence of the conviction or acquittal of a former crime were treated in the recent monographic note on "Res Judicata in Criminal Proceedings," attached to Mitchell v. State, 103 Am. St. Rep. 19.

In Commonwealth v. McPike, 3 Cush. 181, 50 Am. Dec. 727, the record of conviction for assault and battery upon a wife was held admissible to prove the fact of conviction on the subsequent trial of the husband for manslaughter because of her death from such assault.

The effect of an acquittal on the trial of the former offense was touched upon in the following cases: People v. Frank, 28 Cal. 507; State v. Tindal, 5 Harr. (Del.) 488; McCartney v. State, 3 Ind. 353, 56 Am. Dec. 510; Bell v. State, 57 Md. 108; State v. Travis, 39 La. Ann. 356, 1 South. 817; State v. Robinson, 16 N. J. L. 507; Ivey v. State, 43 Tex. 425; Kitchen v. State, 26 Tex. App. 165, 9 S. W. 461; Crass v. State, 31 Tex. App. 312, 20 S. W. 579; Trogdon v. Commonwealth, 31 Gratt. 862; Hall v. United States, 150 U. S. 76, 14 Sup. Ct. Rep. 22, 37 L. ed. 1003. In this connection see, also, subdivision IV.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

TILLY v. MITCHELL AND LEWIS COMPANY.

[121 Wis. 1, 98 N. W. 969.]

HIGHWAYS, Action by Private Persons for Obstruction of.—To entitle a private person to maintain an action for damages resulting from the obstruction of a public highway, or a suit in equity to prevent such obstruction, he must have sustained damages differing not merely in degree, but in kind, from the damages sustained by the general public. (pp. 1008, 1009.)

HIGHWAYS—Obstruction—Injury Which will Sustain Suit by Private Person.—Where it is proposed to vacate or obstruct a public street, property owners whose lots abut thereon, but not on the block where it is proposed to be vacated or obstructed, which lots will be greatly depreciated in value by the proposed action, sustain a sufficient special or pecuniary injury to entitle them to maintain a suit to have declared void a municipal ordinance authorizing such obstruction or vacation. (p. 1011.)

LEGISLATIVE DEPARTMENT, Control of the Courts Over.—Legislative acts within the power of the legislative body are not subject to revision or control by the courts, on the ground of inexpediency, injustice, or impropriety. (p. 1012.)

MUNICIPAL ORDINANCES, Motives for Enactment of.—The validity of a municipal ordinance authorizing the vacation of a part of a public street cannot be assailed on the ground that the council adopting it acted from a wrong motive and wholly for the benefit of a private corporation, no corruption, fraud, or want of power being claimed. (p. 1015.)

PUBLIC STREETS—Devoting to Private Uses.—A public street is reserved for public uses, and none other, and a city council has no power to devote any part to private uses. (p. 1015.)

STREETS, Public, Authorizing Construction of Bridges or Buildings Over for Private Purposes.—A municipal ordinance purporting to authorize a private corporation to construct such buildings, bridges, and passageways as its business may require above the surface of a public street, not less than fourteen feet above its surface, provided the passageway is kept lighted, paved, and repaired as required by the council, is void. (pp. 1015, 1016.)

Suit in equity to declare void municipal ordinances of the city of Racine, one of which vacated a portion of Eighth street, and the other permitted the defendant corporation to construct over and across the portion of such street not vacated such buildings, bridges, and passageways as its business might require, the same to be not less than fourteen feet above the surface of the street, and to be paved, and kept in repair as directed by the city council. The part of Eighth street sought to be vacated by the ordinance was between Center street and Washington avenue, between which points an unvacated street was left twenty feet in width. It was charged in the complaint that the object of the ordinance was to devote the vacated portion of the street to the use of the defendant corporation, though the street was of great public utility, and the public interest did not require the vacation. The lots of the several plaintiffs joining in the suit were situated as follows: That of Fischer on the northeast corner of Eighth and Center streets; that of Tilly on the southwest corner of Eighth and Racine streets, two blocks west of the vacated portion of Eighth street; that of Nelson at the corner of Eleventh and Washington streets, three blocks distant; and that of Owen on Racine street, two blocks distant. The ordinances assailed were adopted after a petition therefor by the defendant corporation. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action, and that the plaintiffs had not legal capacity to sue. This demurrer being sustained, judgment was entered for the defendant, and the plaintiff appealed.

Hand & Hand, for the appellants.

Kearney, Thompson & Myers, for the respondent.

*5 WINSLOW, J. This is an action in equity by property owners suing in their own right to declare void two ordinances passed by the common council on the ground that they unlawfully devote a public street to private use.

The first question raised by the demurrer is whether the plaintiffs, or any of them, show themselves entitled to maintain an action on their own behalf. This court at an early day recognized the rule that in order to entitle a private person to maintain an action for damages resulting from the obstruction of a public way, or an action in equity to prevent such an obstruction, it must appear that the plaintiff has sustained damage differing not merely in degree, but in kind,

from the damage sustained by the general public. In other words, the plaintiff's injury must be of a different character from that sustained by the public in general: Walker v. Shepardson, 2 Wis. 384, 60 Am. Dec. 423. This rule has been consistently followed, and is in accord with the law elsewhere: Clark v. Chicago Ry. Co., 70 Wis. 593, 5 Am. St. Rep. 187, 36 N. W. 326; Zettel v. West Bend, 79 Wis. 316, 24 Am. St. Rep. 715, 48 N. W. 379; Baier v. Schermerhorn, 96 Wis. 372, 71 N. W. 600. This rule, like many others, is far easier of statement than of application. Indeed, it seems hardly possible to lay down any rule which shall be so clearly stated and so universally applicable that the mere statement of it will solve the question of what constitutes this peculiar and different injury in a given case. It is very well settled that the mere fact that a property [6] owner is compelled to pursue a longer route in going to or coming from his real estate constitutes no peculiar or different injury. This is an injury which is shared by the general public, though not in the same degree: Zettle v. West Bend, 79 Wis. 316, 24 Am. St. Rep. 715, 48 N. W. 379; Clark v. Chicago Ry. Co., 70 Wis. 593, 5 Am. St. Rep. 187, 36 N. W. 326. On the other hand, in Walker v. Shepardson, 2 Wis. 284, 60 Am. Dec. 423, the driving of piles in front of plaintiff's wharf, thus impairing the value and usefulness thereof, was held a special and peculiar injury. So, also, in Barnes v. Racine, 4 Wis. 454, the building of an unlawful bridge in a navigable river, which would impede navigation and interfere with the use of wharfs and docks owned by riparian proprietors, and impair their value, was held to be such an injury. So the unlawful closing of a street or public place, forming the only access to plaintiff's premises, is always held to be such an injury: Williams v. Smith, 22 Wis. 594. And it is not necessary that the street or place form the only access to the plaintiff's premises. If the plaintiff's lots adjoin the street or place to be closed, even though there be other access, and it is shown that the value of the lots will be greatly diminished and the risk from fire increased, and the lots otherwise injured, the required special and peculiar injury is shown: Pettibone v. Hamilton, 40 Wis. 402. Again, it has been frequently held that one who buys a lot in a plat whereon streets are marked has the right, as against his grantors, to have the streets on the plat which are appurtenant to his lot and contribute to its value forever kept open, and may enforce that right by private action: Donohoo v. Murray, 62 Wis. 100, 22 N. W. 167;

McFarland v. Lindekugel, 107 Wis. 474, 83 N. W. 757. A learned review of the authorities then existing on this question is found in the case of Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123, and is referred to with approval in Enos v. Hamilton, 27 Wis. 256. That was a case where a highway by prescription had been built upon by the defendant, and his building diverted travel from and obscured the plaintiff's [7] warehouse, making it less eligible as a place of business, and productive of less rent, but not cutting off access from other streets, and it was held that the plaintiff had suffered a special damage entitling him to sue alone. In discussing the two kinds of injuries, public and private, resulting from the obstruction of a highway, the court in that case well says:

"The people at large are supposed to be injured merely because they cannot pursue a particular track, which is an inconvenience felt by thousands, to be redressed by a prosecution in the name of the commonwealth. They suffer no actual particular injury to their trade or estates, and a prosecution on behalf of the public furnishes the appropriate remedy. But individuals who in their persons or estates suffer great damage, which may be proved to proceed and follow necessarily from the public nuisance, surely stand upon different ground, and each may have his action and recover for the particular damage according to the evidence."

The phrase used in the foregoing quotation, "individuals who in their persons or estates suffer great damage," comes perhaps as near being a satisfactory expression of the principle as any that has been used. As before indicated, a person whose lot abuts upon the particular piece of street which is unlawfully closed or obstructed is universally held to be specially and peculiarly injured, though he may have other access to his lot; but many of the cases draw an arbitrary line at this point, and maintain that when the plaintiff's lot fronts upon another part of the street no such injury is shown. Certainly the distinction is illogical. The man whose lot fronts upon the next block may be fully as deeply injured in the decreased value, rentability, and desirability of his lot as the man whose lot fronts on the block which is closed. One may suffer as great damage in his estate as the other. True, there may be many such individual owners, but that cannot affect individual rights. There may be twenty or there may be fifty of them, but if each has suffered great damage to his estate by the unlawful closing of [8] a street, why shall not each have his action?

Neither twenty men nor fifty men constitute the general public. The general public is composed of the great mass of individuals who own no property in the vicinity and who may wish to pass over the street or not, and who, if they do, simply suffer the trifling inconvenience of being obliged to make a circuitous trip. The man who owns a lot in the next block, and whose lot has lost a great part of its value by reason of the closing of the street, manifestly suffers some injury different in its nature from the mere inconvenience suffered by the general public. There are at least two plaintiffs in the present case who own lots fronting on Eighth street—one in the next block to the east, and the other two blocks to the west of the block attempted to be vacated. The complaint alleges distinctly that the property of each will be greatly depreciated in value by the proposed vacation and occupation of the street. We hold this to be a sufficient allegation of special or peculiar injury to entitle them to maintain an action of this kind, and we do not find it necessary to go further or critically examine the rights of the remaining plaintiffs. This conclusion is believed to be in strict harmony with and analogous to the principle adopted in the line of cases holding that where by an unlawful, though temporary, obstruction in a navigable river a manufacturer is deprived of access to his mill and his business damaged thereby, or an improvement company loses tolls, or a logger is put to additional expense in handling his logs, there is in each case a peculiar injury different from that suffered by the general public who might wish to navigate the river, which will sustain a private action: Enos v. Hamilton, 27 Wis. 256; Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61; Gates v. Northern Pac. Ry. Co., 64 Wis. 64, 24 N. W. 494. In each case the special and peculiar injury is simply a direct and substantial loss in money, a damage to the person or estate of an individual traceable directly to the public nuisance, and not common [9] to the public in general, and so answering the requirements of the text laid down in Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123.

Proceeding from this question to the merits of the controversy, we are to consider first the attack upon the ordinance which attempts to vacate all but a twenty-foot strip of Eighth street between Center street and Washington avenue. The charter of the city of Racine (Laws of 1891, c. 40, sec. 54) gives the common council of the city power to vacate, in whole or in part, such streets or alleys in the city "as in their opinion

the public interest may require to be vacated, or such as in their opinion are of no public utility." The section provides for notice of hearing prior to the adoption of the ordinance, and also for the assessment of benefits and damages on request of any party interested.

The ordinance of vacation in the present case declares that the north twenty-five feet in width and the south fifteen feet in width of that part of Eighth street between Center street and Washington avenue is vacated "for the reason that such portions of said street are of no public utility and for the reason that the public interest requires such vacation." Although it is alleged in the complaint that the ordinance is void, and that the proceedings resulting in its passage were illegal, irregular, and ultra vires, there is no specific charge of any irregularity or illegality in its passage, nor was it claimed upon the argument that there was any such irregularity or illegality in procedure. The claim is and was that the ordinance of vacation was passed solely for the private benefit of the defendant corporation, and that the public good in no way demanded it, and hence that it was illegal and void. So the question really is whether in this action the validity of the ordinance can be challenged on the ground that the council acted from a wrong motive. Corruption is not claimed, fraud is not claimed, want of power is not claimed, but the simple claim is that the members of the council in exercising their legislative powers acted from improper [10] motives and subordinated the public interest to the private interests of the defendant corporation.

The general principle that legislative acts within the power of the legislative body to pass are not subject to revision or control by the courts on the ground of inexpediency, injustice, or impropriety is well settled, and has nowhere been stated with greater vigor than by this court. Thus, in Brodhead v. Milwaukee, 19 Wis. 624, 88 Am. Dec. 711, it was said: "This court can, and when properly presented must, deal with and determine questions of the power of the legislature under the constitution; but it cannot lay its hand upon or interdict a statute, or arrest its operation, because such statute is either unwise, unjust, or oppressive, there being no question of legislative power involved."

The supreme court of the United States in Angle v. Chicago etc. Ry. Co., 151 U. S. 1, 14 Sup. Ct. Rep. 240, 38 L. ed. 55. thus enunciates the doctrine: "The rule, briefly stated, is that

whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motive of the legislators, or the reasons which are spread before them to induce the passage of the act. This rule rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

In both of the cases quoted from, acts of the legislature were under consideration, but the same general principle has been frequently recognized as applicable to the acts of the common council which are legislative in their character, as is the ordinance under consideration: State v. Superior Court, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819; Lange v. La Crosse etc. Ry. Co., 118 Wis. 558, 95 N. W. 952. It is true that certain apparent exceptions to the rule are recognized, as, for instance, where an ordinance is entirely unreasonable. [11] This, however, can hardly be properly called an exception, because it is in fact a case simply of lack of power. Power is not delegated to municipal bodies to pass ordinances which are wholly unreasonable. An example of this principle is found in Le Feber v. West Allis, 119 Wis. 608, 100 Am. St. Rep. 917, 97 N. W. 203, where an ordinance granting lighting franchises, which was also a contract, was held void for unreasonableness, and it was said that legislative power was delegated to subordinate political divisions of the state for public purposes only, and that if an act be so remote from every public purpose that no relation thereto can within human reason be discovered, such an act must be deemed to be beyond the power of a subordinate legislative body, and will be set aside by the courts: See, also, Clason v. Milwaukee, 30 Wis. 316; Stafford v. Chippewa etc. Ry. Co. 110 Wis. 331, 85 N. W. 1036, and cases cited.

It is said in McQuillan on Municipal Ordinances (section 161): "Neither the motives of the members nor the influences under which they acted can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers." Mr. Dillon, in his work on Municipal Corporations, at section 311 (fourth edition), says: "It is doubtless true that the courts will not in general inquire into the motives of the council in passing ordinances." He follows this statement with the remark: "We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may

be impeached for fraud, at the instance of persons injured thereby." This seems to be simply the author's own view.

In Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145, it was said by Mr. Justice Field in the opinion of the court relating to a city ordinance claimed to be unreasonable:

"The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they [13] may be disclosed on the face of the acts or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. . . . . The diverse characters of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, preclude all such inquiries as impracticable and futile."

In the case of Knapp-Stout & Co. v. St. Louis, 156 Mo. 343, 56 S. W. 1102, an ordinance vacating part of a street was attacked by a property owner on the street on the same grounds as in the present case, and the court said that in the absence of fraud the passage of such an ordinance comes within the legislative powers expressly delegated to the city by its charter to vacate streets and alleys, and that power will not be controlled or reviewed by the courts. In the case before us neither fraud nor corruption is alleged, so that it is unnecessary for us to consider the suggestion of Mr. Dillon and the Missouri supreme court. The sole claim is that the council have vacated a part of a street for a private use when it was needed by the public. This means that the motives of the councilmen were wrong and their judgment unsound. We think the courts will not entertain an inquiry into the truth of these charges. The ordinance was within their power to pass. On its face it purports to be passed for a purely public purpose. Such a purpose is entirely possible, notwithstanding a private benefit may at the same time inure to the defendant. The exemption from keeping in repair a wide street and the lessened expense of caring for a narrow one may have been considered an entirely adequate public gain to justify the vacation, and who shall say that the aldermen did not have this idea in mind?

Doubtless had the council attempted to sell and convey a part of the street to the defendant, its action could be held void by

the courts, because that would be an act beyond its [13] power; but it was within the power of the council to vacate the street when, in its judgment, the public interest required such action, and even though the council may have been wrong in its judgment, or may have mistaken a private interest for a public one, our conclusion is that the courts cannot arrest the operation of the ordinance for these reasons, and hence that no cause of action is stated in the first count of the complaint.

The second count, however, presents an entirely different question. By the ordinance here attacked the council attempted to grant to the defendant the right to bridge over the remaining twenty feet of the street not vacated, and build buildings to any height thereon, for private uses, provided it left a passageway twenty feet wide and fourteen feet in height, and kept the same lighted, paved, and in repair, as required by the council. It is impossible for us to perceive how it can be claimed that the council had power to grant any such rights to anyone in a public street. So long as it remains a street, it is reserved for public uses and for public uses alone, and the council has no power to devote any part of it to private uses, even though that part be merely a part of the space above the roadbed: Elliott on Roads and Streets, 2d ed., sec. 647. In Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373, it was well said, in reference to this identical question of the power of a common council to authorize the building of projections over the street and sixteen feet above the sidewalk: "The right of passing along or over a road has connected with it certain incidents which are essential to the enjoyment of it, such as light, air, and view. If a highway should be covered over, for instance, by the owners of property fronting on either side of it, so as to shut out the light from above, the enjoyment would not only be greatly interfered with, but it might often be rendered dangerous and practically useless."

The same doctrine is held with reference to a private bridge over an alley in the case of Field v. Barling, 149 Ill. [14] 556, 41 Am. St. Rep. 311, 37 N. E. 850, 24 L. R. A. 406, where a number of authorities along the same line are cited and reviewed. Common councils have no authority to turn a street into a tunnel for the purpose of granting to private parties for private use the enjoyment of everything above the tunnel. The proposition needs no authority. The council holds the easement in the street for public use alone. The attempt to divert a part to private use is an attempt to exceed their powers, and

hence, under principles already stated, can be controlled by the courts. It follows that the second count in the complaint states a good cause of action.

By the Court. Judgment reversed, and action remanded with directions to enter an order sustaining the demurrer as to the first cause of action, and overruling the same as to the second cause of action, and for further proceedings according to law.

The Owner of Property Abutting on a Public Street has a right and interest in the street distinct and different from that of the general public: Long v. Wilson, 119 Iowa, 267, 97 Am. St. Rep. 315; note to Wright v. Austin, 101 Am. St. Rep. 106. That he has a right to have the highway continued, see the note to Wright v. Austin, 101 Am. St. Rep. 117; and that he may recover damages if it is vacated, see Heinrich v. St. Louis, 125 Mo. 414, 46 Am. St. Rep. 490, and note. The vacation of a street may be enjoined by an adjacent lot owner whose property would thereby be depreciated in value, notwithstanding others would be affected in like manner: Texarkana v. Leach, 66 Ark. 40, 74 Am. St. Rep. 68. But one who is not an abutter on the vacated part of a street, and who has ample means of access to his property by other public ways, is held, in Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 87 Am. St. Rep. 600, not entitled to an injunction against such vacation or against the erection of a building upon the part of the street vacated. But see O'Brien v. Central Iron etc. Co., 158 Ind. 218, 92 Am. St. Rep. 305.

STANDARD MANUFACTURING COMPANY v. SLOT.

[121 Wis. 14, 98 N. W. 923.]

EVIDENCE of Other Transaction with Other Persons is not admissible to prove guilty intent in making certain false representations, if it is immaterial to the cause of action whether such representations were made with a specific bad intent or not. (p. 1019.)

CONTRACTS, False Representations Inducing Signing without Reading—Rescission.—If false representations were made of such a character as to reasonably excuse one from reading a proposed written contract, and he was thereby induced to sign it without knowledge of its contents, he may rescind it by acting seasonably. (p. 1019.)

CONTRACTS—False Representations.—If a Person Either Knowingly or Ignorantly Makes a False Statement of Fact in a business transaction, reasonably calculated to deceive another and induce him to do that which he would not do with knowledge of the truth, and it has that effect, the act of such other is attributable to fraud, and is not binding on him, unless he subsequently ratifies with knowledge of the facts, or in some other way precludes himself from rescinding it. (p. 1019.)

FALSE REPRESENTATIONS, Immateriality of Intent.—Where it appears that the signing of a contract was induced by false representations of an agent of one of the contracting parties, evidence to prove his innocence of any bad intent is not admissible. (p. 1020.)

EVIDENCE, Cross-examination, When Proper.—Where a party testifies that he supposed when signing a contract that it was a commission agreement, and refused to abide by it upon finding that it was of a different character, it is error to sustain an objection to a question asked on cross-examination as to whether he ever thought of the subject of consignment or of the word "commission" until after the suit was commenced. (p. 1020.)

EVIDENCE.—The Right of Cross-examination is of great importance in discovering the truth in a judicial investigation, and should be liberally allowed as long as anything of value is called for thereby. (p. 1021.)

FRAUD must be Established by the person alleging it by a preponderance of clear and satisfactory evidence. (p. 1023.)

CONTRACT, Presumption of Knowledge of Contents of.—One who signs or accepts a written contract, in the absence of fraud or mistake, is conclusively presumed to know and assent to its contents. (p. 1023.)

CONTRACT, Signing without Reading.—The fact that false representations are made in respect to a paper is not necessarily sufficient to excuse a person for affixing his signature in ignorance of its contents, unless under all the circumstances, in view of his duty to give reasonable attention to his business interests, the false representations were reasonably calculated to and did induce him not to make an investigation which he would otherwise have made. The signer cannot excuse himself by the mere plea that he was busy or was habitually neglectful under such circumstances. (p. 1023.)

FRAUD and Inattention, Contract Due to Combined Effect of. Where there is fraud on one side and inattention to reasonably guard his interests on the other, and but for the latter feature the former would have been ineffective, and loss occurs to the inexcusably negligent one, he is without remedy. (pp. 1023, 1024.)

CONTRACTS, Signing without Reading, When Inexcusable.—One who, being of average intelligence and experience, and requested to read a contract, nevertheless signs it without reading, cannot rescind it on the ground that the agent of the other party falsely represented its contents, when a casual glance at a few lines in close proximity to the signature must have acquainted the signer with the fact that the contract was not of the character which he claims it was represented to be. (p. 1025.)

APPELLATE PRACTICE—Final Judgment, When will not be Entered by the Supreme Court.—A motion in a trial court for judgment notwithstanding the verdict, without a motion to change the findings of the verdict to conform to the evidence, does not make it proper for the supreme court, on reversing the judgment, to dispose of the case finally without a new trial. (p. 1027.)

Action upon a written contract, by the terms of which the plaintiff offered to furnish the defendant certain articles for one hundred and seventy-three dollars upon conditions named in the contract. These conditions gave the defendant the right

to return any article not found suitable to his trade, the purchase price to be credited to him on payment for new goods to the extent of two-thirds of the price of the latter. The contract also guaranteed a profit of eighty-six dollars and fifty cents on the goods handled for one year, and stipulated if the sales were not sufficient to pay such profits, to take back all the goods at the purchase price remaining on hand at the end of the year, or to make up such profit in cash; all goods shipped and not on hand or returned to be considered as sold, and the profits to be figured as the difference between the net wholesale and retail prices named in the contract. No goods were to be considered as shipped on consignment or commission, and no representations made by any salesman to be binding on the plaintiff unless mentioned in the contract. The purchaser was to make certain specified efforts in selling the goods and to pay the purchase price in equal payments, two, four, six, and eight months from the date of the invoice. The contract also stipulated that the defendant had read it and knew the contents of it.

The answer pleaded that the defendant's signature was obtained by fraud, in that the plaintiff's agent represented at the time the contract was signed that it was a commission contract, and that the defendant affixed his signature, relying on such representations, and as soon as he discovered the true character of the paper, he repudiated it, and refused to accept the goods contracted for.

The plaintiff's counsel moved at the close of the evidence that the jury be directed to return a verdict in his favor, which was overruled. The jury found substantially (1) that the plaintiff falsely represented to the defendant that the agreement which was signed was for the acceptance and sale of goods on commission, and that he would be entitled to return any of them at any time he desired, and no charge would be made for the goods returned; (2) that the defendant was induced to sign the contract by false representations; and (3) that the plaintiff was entitled to judgment for one hundred and seventy-eight dollars and twenty-two cents, if for anything.

Counsel for plaintiff moved for a judgment, notwithstanding the verdict. This motion being denied, he moved that the first and second findings be vacated, and for a new trial. This motion was also denied. Judgment was then entered for the defendant dismissing the complaint. The plaintiff appealed.

Kearney, Thompson & Myers, for the appellant.

Cooper, Simmons, Nelson & Walker, for the respondent.

[18] MARSHALL, J. The court, against appellant's objections, permitted evidence to be introduced respecting several transactions claimed to have taken place between its agent and strangers to the litigation, of the kind respondent was charged with. They were entirely independent of the occurrence under investigation. The evidence seems to have been offered to prove guilty intent on the part of appellant in making the alleged false representations which respondent claimed induced him to sign the contract. It was clearly irrelevant, and prejudicially so. It was entirely immaterial to plaintiff's cause of action whether its agent made false representations with specific bad intent or not. If false representations were in fact made, of such a character as to reasonably excuse respondent from reading the contract, and he was thereby induced to sign it without knowing its contents, it was competent for him to rescind the same if he acted seasonably. If a person knowingly or ignorantly makes a false statement of fact in a business transaction reasonably calculated to deceive another and induce him to do that which he would not do with knowledge of the truth, and which has that effect, the act of such other is attributable to fraud and is not binding upon him unless he subsequently ratifies it with knowledge of the facts or in some other way precludes himself from rescinding it: Miner v. Medbury, 6 Wis. 295; Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. 473; Davis v. Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; Monreal R. L. Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Beetle v. Anderson, 98 Wis. 5, 73 N. W. 560; Hart v. Moulton, 104 Wis. 349, 359, 76 Am. St. Rep. 881, 80 N. W. 599; Krause v. Busacker, 105 Wis. 350, 354, 81 N. W. 406; Zunker v. Kuehn, 113 Wis. 421, 425, 88 N. W. 605.

[19] In Hart v. Moulton the court said: "Our own decisions are replete with precedents where false representations of material facts, made to induce a sale, relied upon by the seller, were held sufficient to render the sale voidable at the election of the seller, and that, whether the purchaser knew or did not know the representations made by him were false, it being held sufficient if he either knew or ought to have known the truth of his statements before making them."

Speaking on the same subject in Krause v. Busacker, the court said: "If the representations were material and false, and the

maker thereof either knew or ought to have known that they were false, or if he made them recklessly, with no knowledge on the subject, and the injured party relied upon them as true, without the present means of knowledge of their falsity, and suffered damage thereby, then the fraud is complete."

The law being so definitely settled, to permit in a case of this kind proof of numerous independent transactions claimed to be similar in kind to the one complained of, but in no way involved in the litigation, thereby throwing the burden upon the party so attacked of meeting a multitude of collateral charges neither suggested by the pleading nor proper to be so suggested, violates some of the fundamental principles of trial evidence, and in a most prejudicial manner: Jones on Evidence, sec. 140. In Baker v. State, 120 Wis. 135, 97 N. W. 566, the court discussed at considerable length the circumstances under which other occurrences than the one charged and forming the subject of the judicial investigation may be given in evidence. An examination of that case will show that the doctrine has no application whatever to a case like this. It is one that applies within very narrow limits, and the danger of exceeding the same is so great that counsel and court should be exceedingly careful in entering the field at all.

The court excluded evidence offered by appellant to the 20 effect that its agent, in the transaction with respondent, was innocent of any bad intent. The ruling was proper for the reasons which require the ruling of the court heretofore discussed to be condemned, though we must say the two rulings are not consistent.

Respondent testified that he supposed when the contract was signed that it was a commission agreement and refused to abide thereby upon finding that it was of a different character. For the purpose of testing his credibility in that regard he was asked by appellant's counsel these and other questions of a similar character: "Q. You never thought of the subject of consignment until after the suit was brought, did you?" "Q. You never thought of the word 'commission' till after this suit was brought, did you?"

All of such questions were ruled out on objections by respondent's counsel. We cannot approve thereof. Respondent's case depended upon whether he was deceived into signing a contract different from the one made verbally between him and the agent. Within all reasonable limits, cross-examination of respondent respecting circumstances calculated in any

appreciable degree to throw light on that subject should have been permitted. The right of cross-examination is of great importance in discovering the truth in a judicial investigation, and should be liberally allowed so long as anything of value is called for thereby: McMahon v. Eau Claire W. W. Co., 95 Wis. 540, 70 N. W. 829. It seems that the court plainly unduly limited appellant's right in that regard.

The most important complaint made by appellant's counsel is because the court failed to direct a verdict in its favor and failed to render judgment in its behalf notwithstanding the verdict, because the evidence was insufficient to warrant a finding that appellant was defrauded into signing the contract. The evidence and circumstances respecting that question are in the main as follows: The contract was made [21] June 4, 1902, and was plain. It expressly provided that goods were not to be furnished thereunder to be sold on commission. All its features were those of a sale, not a commission, contract. In two lines immediately above where respondent signed the paper were these words addressed to appellant: "Please ship the goods herein described, on the terms and conditions herein stated, all of which we have carefully read and find complete and satisfactory. We understand that agreements to be binding must be noted hereon."

Immediately above the signature of appellant occurred this language: "The amount of this order is payable in four equal payments due in two, four, six and eight months from date of invoice," etc.

Under respondent's signature and in close connection therewith, in a conspicuous way, was this language, plainly intended to form a part of the contract: "The Standard Mfg. Co. to send a bond to the Commercial & Savings Bank of Racine, Wis., guaranteeing a profit of at least $86.50 for one year or to repurchase any goods on hand at purchase price as above provided."

Respondent testified thus: "I did not read the contract because I hadn't the time. That is my only excuse. I didn't have the time to read the two lines over my name. I didn't take the time. My business was urgent. I did not know what the amount of the contract was. I knew I was buying some extracts and toilet articles, but how much wasn't stated. I understood I had the goods on commission. There was no rate of commission, only we were to have eighty-six dollars and fifty cents, which was supposed to be our profit. The agent fur-

nished me the contract after I signed it. No one prevented me from reading it. I put it on my desk. He said I didn't have to pay for the goods till they were sold. Relying on that I consented to trade. He asked me to sign my name. I asked him if the paper contained what we had talked about and he said 'Yes.' I relied on that. He asked me [22] to read it. I said I had no time. I asked him if he had made the contract with others who had read the paper. He answered, 'Yes, lots of them.' I am sure he asked me to read the paper before I signed it. I cannot say the word 'commission' or word 'consignment' was used. I understood I was not to pay for goods not sold. The agent said that. I did not ask him to read the contract. It is not customary for any of us to read such contracts. He asked me to read it some way. I asked him whether it contained what we talked about, and what he said I do not know. I really could not say for sure. He asked me to read it, but in what way he expressed himself I do not know. I never read the paper he left with me."

That fails to show with any degree of definiteness that appellant's agent made any representations to respondent that the paper was written according to the verbal understanding. At the end of respondent's cross-examination, as will be seen, he said he was not sure whether such representations were made or what was said. The only thing he seems to have been sure of is that he was requested to read the paper before signing it, and that the only reasons why he did not do so were because he was too busy and because he did not usually read such papers before signing them. True, after respondent confessed that he could not say "for sure" whether any representations were made to him as to the paper being written according to the verbal agreement, a direct question was put by the cross-examiner, evidently for the purpose of showing how readily respondent would return to his first story when his attention was drawn directly to the necessity therefor, as follows: "You asked him if it contained just what you and he talked?" to which he answered: "He said yes, he knew I was busy." Under the circumstances that hardly weakened his confession that he could not say whether the agent made any representations to him or not, as regards whether the paper was drawn according to the verbal understanding. True, he said on his direct examination that he was induced to sign the paper by the representations made [23] by the agent, but he also said, as we have seen, that the sole reason why he did not read the paper was that

he was too busy; that he was requested to read it, and was not prevented by any person from doing so, and that it was customary to sign such papers without reading them.

In view of the well-settled principle that he who alleges fraud as a ground for relief in a judicial proceeding, to succeed, must establish the charge by a preponderance of the evidence, which also must be clear and satisfactory (Rice v. Jerenson, 54 Wis. 248, 11 N. W. 549; F. Dohmen Co. v. Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69), and that other principle that he who signs or accepts a written contract, in the absence of fraud or mistake is conclusively presumed to know its contents and to assent thereto (Wilcox v. Continental Ins. Co., 85 Wis. 193, 197, 55 N. W. 188), it is extremely difficult to perceive how the verdict in this case can be justified by the evidence. There is no positive, consistent evidence that any false representations were made by appellant's agent respecting the contract, and certainly none which, under the circumstances, can fairly be said to excuse respondent for not knowing the character of the paper which he signed.

The law applicable to the aspect of this case last suggested has been so recently discussed that it seems hardly necessary to go over the subject again: Bostwick v. Mutual L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; Kaiser v. Nummerdor, 120 Wis. 234, 97 N. W. 932. It is there emphatically laid down that a person is bound to know the contents of a paper which he signs, no act of the adverse party or circumstance for which he is responsible occurring reasonably calculated under the circumstances to divert such person's attention therefrom, and which does so effectually. The fact that a false representation is made in respect to the paper is not necessarily sufficient to excuse such person for affixing his signature thereto in ignorance of its contents, unless [24] under all the circumstances, in view of his duty to give reasonable attention to the protection of his own interests, the false representation was still reasonably calculated to and did induce him not to make the investigation which he otherwise would have made. A person cannot sign a paper in ignorance of its contents and thereafter excuse such ignorance by the mere plea that he was busy or that he is habitually neglectful in such circumstances, and throw upon the courts the burden of protecting him from the consequences of his imprudence. The policy of the law is fixed to the effect that he who will not reasonably guard his own interests when he has reasonable opportunity to do so, and there

is no circumstance reasonably calculated to deter him from improving such opportunity, must take the consequences. Courts do not exist for the purpose of protecting persons who fail in that regard. Where there is such inattention upon the one side and fraud upon the other, and but for the former feature the latter would not be effective, and loss occurs to the inexcusably negligent one, he is remediless; not because the wrongdoer can plead his own wrongdoing as an excuse for not making reparation, but, first, because the consequences are attributable to inexcusable inattention of the injured party; and second, because the court will not protect those who, with full opportunity to do so, will not protect themselves. Much difficulty has been experienced at times in not appreciating that there may be fraud upon one side, concurring with inexcusable ignorance upon the other, resulting in an injury, when but for the latter fault it would not have occurred, and there be no judicial remedy. That comes largely from paying more attention to eloquent passages in some judicial opinions condemning the wrongdoer—and not too severely—and condemning his attitude of confessing the wrong, so to speak, and shielding himself from the consequences, or attempting to do so, by the ignorance of his victim, than to the decision rendered and the real philosophy thereof, which will be [25] found, as a general rule, to be that the ignorance was in the particular case excusable, testing the conduct of the wronged party by the duty of everyone to pay reasonable attention to his own interests. That difficulty is also largely attributable to the tendency of some authors to select such eloquent passages for their text instead of carefully deducing from the decision the rule of law applied in the case. A good illustration of that is the quotation relied upon by respondent's counsel from 1 Bigelow on Fraud, section 523: "If the representation were of a character to induce action, and did induce it, that is enough. It matters not, it has well been declared, that a person misled may be said, in some loose sense, to have been negligent (in reality negligence is beside the case where the representation was calculated to mislead and did mislead); for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.'"

That was taken from the opinion of Justice Dickey, in Linington v. Strong, 107 Ill. 295. The point presented for decision was whether the court erred in giving the following instruction: "The law requires every person to exercise reasonable

prudence in business affairs, and before relieving a party from the obligations of a contract upon the ground of fraud, it must appear that he exercised reasonable care and prudence to learn the nature of the contract before executing it; if the defendant could read and had an opportunity to read the contract before signing, it was his duty to do so, unless induced not so to do by willfully false statements of the plaintiffs, or one of them, as to its being a copy of the original; and if the defendant had full opportunity to read the contract before signing it, and was not induced to sign it by false statements made by plaintiffs, or either of them, the defendant would not be permitted to deny knowledge of the contents thereof."

The instruction was approved. It will very clearly be seen that it states the law quite differently from what might [26] be gathered from the quotation incorporated into the text by Mr. Bigelow.

We should say in passing that it is immaterial in such a case whether the statements were willfully false or not, or whether the party making the false statements at the time thereof had any specific intent to deceive. In that respect the quoted instruction was open to serious criticism. The language of the learned judge in the opinion, which influenced the framing of the text we have taken the liberty to criticise, was evidently used forgetting for the moment the well-known maxim, "Vigilantibus, et non dormientibus succurrunt jura" (the law assists the vigilant, not the careless). That under some circumstances the law leaves a party where it finds him, and that one of such circumstances is where one appeals for redress who is guilty of an inexcusable fault in falling into the difficulty complained of, is well settled.

Applying the foregoing to this case, admitting for the purposes thereof that there is some evidence tending to show false representations, it seems that respondent, upon his own testimony, was inexcusably ignorant of the contents of the paper he signed. He testified, in effect, that his eyesight was good, and the evidence shows that he was a business man of average intelligence and of considerable experience. A casual glance by such a person at the few lines in close connection with the signature would have acquainted him with the fact that he was not making a commission contract. A casual observation of the two lines immediately above his signature would have drawn to his attention the fact that he was signing a stipulation that he had read the contract and knew its contents and

was satisfied therewith. Failure to observe those features, under the circumstances, leads to the conclusion that respondent in effect closed his eyes to what was plainly before him. He admitted over and over again that he was requested to read the paper; that the reason why he did not was because he was busy; and he said, as before [27] shown, that no one prevented him from reading it. There was nothing about the relations between him and the agent to lull him into security. They were entire strangers to each other, and respondent and appellant were likewise strangers. The evidence shows that he was pressed to make the deal to such a degree as should have suggested the advisability of taking time to learn what was contained in the paper before affixing his signature thereto. To sign it as he did, after being requested to read it, when a mere glance at that portion immediately connected with where his pen rested on the paper would have informed him of the nature thereof upon the vital point, and the laying of the paper away and not looking at it when he had opportunity to do so, shows inexcusable inattention to his own interests in a high degree. His excuse that it was not customary for him in signing such papers to read them, instead of tending to show that his conduct was consistent with proper care, rather indicates habitual negligence. If under the circumstances stated appellant saw fit to shut his eyes not only when he signed the paper, merely because he was busy and it was customary for him to take that course, but thereafter when there was no reason of that kind to deter him from reading the instrument, relying upon the statement of a mere stranger acting in an adversary capacity as to what it contained, he cannot well complain if the courts have not time to open their doors to afford him relief.

The judgment must be reversed and a new trial ordered. If counsel for appellant had moved the court below to change the answers to the special questions so as to conform to the evidence on the subject of respondent's negligence, the case might go back for judgment in appellant's favor. Under the established practice a mere motion for judgment notwithstanding the verdict is no more than a motion for a directed verdict or a motion for a nonsuit, or a motion to set the verdict aside and grant a new trial, as regards a final disposition [28] of the case without a new trial, upon the judgment entered adverse to such motion being reversed upon appeal.

By the Court. The judgment appealed from is reversed, and the cause remanded for a new trial.

One is not Bound by a Contract which he is induced to sign by false representations, he being ignorant of the true character of the instrument, and having no intention to sign such a paper, and not being guilty of negligence: Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974; Willard v. Nelson, 35 Neb. 651, 37 Am. St. Rep. 455. And in Wilcox v. American Tel. etc. Co., 176 N. Y. 115, 98 Am. St. Rep. 650, it is held that the negligence of a party in failing to read a paper which he has signed does not preclude him from attacking its validity. But in Crim v. Crim, 162 Mo. 544, 85 Am. St. Rep. 521, it is held that a person sui juris cannot release himself from a contract, in the absence of fraud, on the ground that he did not read it before signing, if he had an opportunity to read it and deliberately signed it.

EHLEITER v. CITY OF MILWAUKEE.

[121 Wis. 85, 98 N. W. 934.]

MUNICIPAL CORPORATION—Highways—Runaway Teams.—A municipal corporation is liable only to those using the highways in the ordinary manner for the purposes of travel, and a runaway team is not within that use. (p. 1029.)

MUNICIPAL CORPORATIONS—Driver's Momentary Loss of Control.—While a municipal corporation is not liable for injury due to a runaway team, this rule does not apply where the driver's loss of control is momentary only. (p. 1029.)

HIGHWAYS—Horse, When More than "Momentarily Uncontrollable."—A horse which, when driven along a public highway, becomes frightened and runs eighty or ninety feet, resisting the driver's efforts to stop his forward movement, cannot be said to be only "momentarily uncontrollable" in the sense in which that expression is used in the law on the subject of the liability of municipalities for defects in highways. (p. 1031.)

APPELLATE PRACTICE—Final Judgment, When may be Entered in the Supreme Court.—Where, in the trial court, a party moves to strike out a negative and insert an affirmative in the answer given by the jury, and such motion should have been granted, and if granted must have disposed of the case, the supreme court, on appeal, may order the change moved for to be made, and render final judgment accordingly. (p. 1031.)

Actions for damages due to the death of Michael Hart, which was claimed to have resulted from a defect in the highway. He, while driving a quiet horse attached to a buggy containing himself, wife and daughter, reached a point near a bridge which was undergoing repairs and where an electric motor car was stationary, or nearly so. The horse shied at the car and started forward in a run, which continued until he plunged into the

river. The testimony showed that the decedent exerted every effort to stop the horse, but was unable so to do. The jury, by a special verdict found (1) inadequacy of the guard of the bridge; (2) that it was the proximate cause of the injury; (3) that the horse at and immediately prior to being driven into the river was beyond control; (4) that he was no more than momentarily uncontrollable; (5) that decedent could not by the exercise of ordinary care have known that the bridge was open; and (6) that he was not guilty of want of ordinary care. The defendant in the trial court moved to set aside and reverse the answers to each of these questions, all of which motions were overruled, and judgment thereupon rendered for the plaintiff. The defendant appealed.

Carle Runge, city attorney, and Thomas H. Dorr, special assistant, for the appellant.

Toohey & Gilmore, for the respondent.

87 DODGE, J. Upon the trial of this case two sharply conflicting theories were presented and supported by evidence: 1. That the decedent drove more or less rapidly toward the bridge, with his horse under control, until he reached or passed the watchman, and was then unable to stop before going into the river, upon which theory it was claimed he was guilty of contributory negligence, under the rule laid down in Stephani v. Manitowoc, 101 Wis. 59, 76 N. W. 1110; 2. It was contended by the plaintiff that before reaching the bridge the horse became uncontrollable, and while so plunged into the chasm in the highway. The jury, by answer to the third question, found that the horse was beyond control at and immediately prior to the time intestate drove into the river. This necessarily must be understood as adopting the plaintiff's theory. That being assumed, the defendant insists that there is no evidence to support the answer to the fourth question, that such loss of control was only momentary. This theory of the driver's loss of control of the horse rests upon the testimony of two witnesses to the effect that, as he passed an electric motor car at a point approximately ninety feet from the bridge, the horse was frightened, shied, and from that point ran or galloped uncontrolled along the street to and into the river. There is no other evidence whatever of any loss of control, or any change in the conduct or pace of the horse, from a point at least two or three hundred feet away. Thus is presented the question whether a

horse can, by any reasonable possibility, be said to be only momentarily uncontrolled while running a distance of eighty or ninety feet along a highway, in the sense in which that expression is used in the law laid down on the subject of liability of municipalities for defects in their highways.

The rule was early established in Massachusetts and Maine that such liability of municipalities is special and statutory; that only where the defect in the highway is the sole, proximate [88] cause of the injury is such liability imposed, and that if there concurs therewith another proximate cause, for which the municipality is not responsible, there is no liability; and that the running away of a horse is such independent cause, unless itself produced by fault of the town. The principle is also otherwise stated that by the statute municipalities are only made liable to those using the highway in the ordinary manner for purposes of travel, and that a runaway team is not within that use. Wisconsin, whose highway statutes were taken from Massachusetts, early adopted, also, this construction of what is now section 1339, statutes of 1898, and has persistently adhered thereto: Jackson v. Bellevieu, 30 Wis. 250; Schillinger v. Verona, 96 Wis. 456, 71 N. W. 888; Ritger v. Milwaukee, 99 Wis. 190, 74 N. W. 815; McFarlane v. Sullivan, 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; Johnson v. City of Superior, 103 Wis. 66, 78 N. W. 1100; Titus v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91; Higgins v. Boston, 148 Mass. 484, 20 N. E. 105. The courts of both states have, however, recognized what may be called an exception to the foregoing rule, in that one driving the streets in the ordinary manner may be subjected to peril by a defect, such as a declivity or lack of railing, by a sudden or spasmodic movement of the horse, usually a shying or falling, causing immediate contact with the defect, provided the failure of the driver to control the horse is only momentary: Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Olson v. Chippewa Falls, 71 Wis. 558, 37 N. W. 575; Schillinger v. Verona, 96 Wis. 456, 71 N. W. 888; Ritger v. Milwaukee, 99 Wis. 190, 74 N. W. 815; Wright v. Templeton, 132 Mass. 49, 51; Hinckley v. Somerset, 145 Mass. 326, 332, 14 N. E. 166; Scannal v. Cambridge, 163 Mass. 91, 39 N. E. 790. Generally such cases as sustain the exception relate to a sudden swerving or shying of the horse—one of them, at least, to a sudden sickness, staggering and falling and two of them to a sudden backing up from fright. In all, however, great insistence is placed upon the idea that the injury must so accompany the

sudden, so spasmodic and unexpected movement of the horse that the failure to control is but momentary, in the strictest sense of that word. Indeed, this phrase has sometimes been adopted to express the idea: "If a horse . . . . merely shies or swerves, ... so that the driver does not in reality lose control over him": Elliott on Roads and Streets, sec. 615. Generally it may be said that the event sought to be described is wholly inconsistent with a condition where a horse is moving along the road in the course of a struggle for mastery. It is substantially limited to those spasmodic movements which often occur while the horse is generally within the control of his driver, but where the particular movement is so quick and unexpected that it and its results take place before efforts to control can be exerted. Unfortunately, most words are in some degree elastic and are used with variant meaning under differing circumstances, and the word "momentary" is no exception. It is apparent from the judge's charge, not excepted to, that his conception of the idea was merely the antithesis to "permanent." Within the definition given in that charge, any period of struggle between a frightened horse and his driver would be momentary until he became a runaway, completely escaped from the driver's mastery, as an established and permanent condition. Obviously such a moment might permit a run along a highway for a long distance, the driver unable to stop or guide the horse, and yet struggling to do so, with prospect of ultimate success. It is not to be denied that such a conception can be gained from definitions of "momentary loss of control" found in some of the cases above cited, but examination of the events as to which courts were speaking will negative any such meaning. Such cases illustrate the futility of attempting any definition of such a word as "momentary," which alone and undefined is likely to convey a more accurate idea than any substitutionary phrase. It is particularly incorrect to use the word as merely antithetic to "permanent," so as to convey the idea that until the horse has become a runaway, as a permanent condition, he may still be deemed only momentarily uncontrolled. This is to give to the word "momentary" the meaning of "temporary." It is true, as respondent urges, though only within some limits, that the momentary character of the uncontrolled movement of the horse is not necessarily decided by the distance he moves. It is doubtless impossible to say how far a frightened horse may spring before his driver can bring to bear efforts to control him. Neverthe-

less there is a limit within human experience beyond which such movement cannot possibly go. Thus in Olson v. Chippewa Falls, 71 Wis. 558, 37 N. W. 575, and Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166, the courts refused to hold, as matter of law, that a frightened horse might not momentarily reach a defect twenty feet away. In the latter case, however, it was said that sixty feet was beyond any such possibility, the horse's movement being backward. In the following cases a forward movement over the specified distances was held more than momentary, though not entirely because of the distance traveled: Sixty-five or seventy feet (Titus v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91); forty-six feet (Ritger v. Milwaukee, 99 Wis. 190, 74 N. W. 815); seventeen feet (Scannal v. Cambridge, 163 Mass. 91, 39 N. E. 790).

In the present case the horse first shied to one side, and then started forward in a gallop. According to plaintiff's witnesses, the deceased practically at once pulled back on the lines so that the traces were loosened, and the horse traveled at least sixty or seventy feet drawing the vehicle by the bit, and resisting the efforts to stop his forward movement. It cannot be doubted that when the horse recovered from his swerve, and started upon a forward course in resistance to the efforts to stop him, the momentary escape from control contemplated by this rule of law was over. Thenceforward he was a runaway horse, and that, too, wholly without regard [91] to whether ultimately he could have been stopped by his driver. The travel along a street for sixty, seventy or eighty feet after a fright we must hold, as matter of law, is wholly inconsistent with momentary absence of control, as the expression is used in the rule of law permitting liability of a municipality for injuries so occurring.

The views thus declared result, of course, in the conclusion that the fourth question should have been answered "Yes," and that the trial court erred in denying appellant's motion to strike out the negative and insert an affirmative answer. That conclusion being reached, and no reason appearing why a new trial is necessary, our duty is to order done that which ought to have been done, namely, to make the change and render judgment accordingly. This decision renders unnecessary consideration of certain other errors assigned by appellant.

By the Court. Judgment reversed, and cause remanded with directions to grant defendant's motion to amend the special

verdict by changing the answer to the fourth question therein from "No" to "Yes," and, upon the verdict as so amended, to render judgment for the defendant.

The Liability of a Municipal Corporation for injuries sustained by a traveler where his horse becomes frightened and dashes into a defect or obstruction in the street, is discussed in the monographic notes to Morse v. Richmond, 98 Am. Dec. 611; Dudley v. Flemingsburg, 103 Am. St. Rep. 279. See, too, Upton v. Windham, 75 Conn. 288, 96 Am. St. Rep. 197; Schaeffer v. Jackson, 150 Pa. St. 145, 30 Am. St. Rep. 792; Horstick v. Dunkle, 145 Pa. St. 220, 27 Am. St. Rep. 685.

WISCONSIN TRUST COMPANY v. CHAPMAN.

[121 Wis. 479, 99 N. W. 341.]

NOTES AND MORTGAGES by Administrator, Construction of. A transfer of real estate by an administrator under the power and direction of the court must be viewed in the light of his relation to the property and the objects to be accomplished, and the words of transfer must be given an interpretation limited to the occasion. (pp. 1034, 1035.)

MORTGAGES, Construction of and of Notes They are Given to Secure.—From the nature of the proceeding authorizing the execution of notes and mortgages by an administrator, they cover the same transaction and must be construed together. (p. 1035.)

ADMINISTRATORS, Personal Liability of on Notes and Mortgages.—A promissory note reading, "I., O. H. P., administrator of the estate of Sherburn Bryant, deceased, acting under an order of the county court, promise to pay" a sum specified, and a mortgage showing on its face that it is given to secure the payment of such note, create no personal liability against the administrator. (p. 1036.)

ADMINISTRATOR.—A Purchaser of a Promissory Note which on its face shows that it is executed by the promisor as administrator and under an order of court is chargeable with knowledge of the purpose for, and the authority under, which it is executed, and has no right to rely on the personal liability of such administrator. (p. 1037.)

ADMINISTRATOR, When Entitled to Costs of Suit.—If an action is commenced to foreclose a mortgage and obtain a personal judgment against one who executed it as administrator, he, because he has a good defense to the claim that he is personally liable, is entitled to be awarded his costs. (p. 1037.)

ESTOPPEL to Resist Foreclosure of Mortgage Made by an Administrator.—An heir who appears in proceedings in court to authorize the execution of a mortgage by an administrator and also in the settlement of his accounts, and thereafter accepts a partition of the estate which gives him property subject to such mortgage, is estopped from raising the question of the irregularity of the proceedings of the court by which the mortgage was authorized. (p. 1037.)

Suit to foreclose a mortgage and to recover personal judgment for any deficiency which may exist after the sale. The defendant Pierce was sought to be held personally liable, on the ground of having executed the mortgage sought to be foreclosed and the notes which it was given to secure. He was administrator of the estate of Sherburn Bryant, and as such, he, on May 16, 1898, petitioned to the probate court of Milwaukee county for a license authorizing him to mortgage the real estate of the decedent to raise money for the payment of debts. Notice of the application was given by publication, and was also served on Ethel Bryant Chapman and other heirs of the decedent, who filed objections thereto on June 14, 1898. These objections, after hearing by the county court in probate, were overruled, and an order was directed authorizing a mortgage of the real estate to be made as security for a loan of thirty thousand dollars from the Wisconsin Trust Company. Thereafter Pierce executed certain promissory notes as administrator, each of which commenced as follows: "For value received, I, Oscar H. Pierce, as administrator of the estate of Sherburn Bryant, deceased, acting under an order of the county court of Milwaukee, Wisconsin, dated July 1, 1898, promise to pay to the Wisconsin Trust Company, or order," and thereafter specified the sum to be paid, place of payment, rate of interest, etc. The mortgage recited that Pierce, as administrator of Sherburn Bryant, was party of the first part and the Wisconsin Trust Company party of the second part, and it contained covenants on the part of Pierce "administrator aforesaid" for himself, his successors and assigns respecting the keeping of the buildings on the premises insured, the payment of taxes which should be levied on the real estate, and that he was the true, lawful and rightful owner and proprietor of the premises, seised of a good, sure, perfect and indefeasible estate of ownership therein, and had good right and full power and authority to grant, bargain, sell and convey the same, and that he would warrant and defend the title, etc.

After the execution of the mortgage, partition proceedings were instituted, and the property included in the mortgage here sought to be foreclosed was set over to the defendant Ethel Bryant Chapman, subject to the mortgage. Afterward the final accounts of Pierce as administrator were settled, and on petition of the heirs, including Ethel Bryant Chapman, the estate was fully assigned and distributed, she acquiring the property covered by the mortgage.

In March, 1903, the trust company commenced this suit for the benefit of the owners and holders of the notes covered by the mortgage, and they were subsequently made parties plaintiff. The defendant Ethel Bryant Chapman answered denying that the plaintiff trust company was a legally authorized corporation under the laws of Wisconsin, and also denying that Pierce, as administrator, had been licensed and authorized to execute the mortgage, and she claimed that the notes and mortgage were void. The trial court found against her on all the issues tendered by her, and directed judgment foreclosing the mortgage, but denying the right to a deficiency judgment against Pierce, the administrator. The trust company and the other plaintiffs appealed from the judgment in so far as it exonerated Pierce from liability, and also from the part awarding him costs, and the defendant Ethel Bryant Chapman appealed from the whole judgment.

Miller, Noyes & Miller, for the plaintiffs.

Nath. Pereles & Sons and G. D. Goff, for the defendant Oscar H. Pierce.

Rublee A. Cole, for the defendant Ethel Bryant Chapman.

485 SIEBECKER, J. Defendant Oscar H. Pierce, as administrator of the estate of Sherburn Bryant, deceased, under a license duly granted him by the county court for Milwaukee county, made and executed the notes and the mortgage under the circumstances given in the foregoing statement of facts. The main controversy on this appeal pertains to the liability of the defendant Oscar H. Pierce, who was duly appointed, and who duly qualified, as administrator of the estate of Sherburn Bryant, deceased. That he, as such administrator, 486 has no interest in the real estate of the deceased, nor power to sell or encumber it, is elementary in the law of administration. The only authority to deal with real estate must come from the court from which he received his appointment, under the statutes providing for the disposition of lands by executors and administrators. Under these statutes, the real estate of the decedent may be applied in satisfaction of the decedent's debts, to the extent they remain unpaid after applying his personal property. The statutes grant county courts the power, under the procedure prescribed, to accomplish this object. To render a sale or mortgage of the lands valid within these provisions, there must be a substantial

compliance therewith under the direction and authority of the county court. In exercising these powers administrators act as the instruments of the law, and they are strictly bound by the special authority vested in them for this purpose. A transfer of the real estate by an administrator, under the power and direction of the court, should therefore be viewed in the light of his relation to the property and the objects to be accomplished, and the words of the transfer should be given an interpretation limited to the occasion.

Applying these considerations to the instant case, what was the undertaking of the defendant Oscar H. Pierce under the notes and mortgage given the Wisconsin Trust Company to evidence the amount loaned by it for the purpose of paying the claims against the decedent by mortgaging his real estate? We must observe at the outset that this transaction of the administrator differs widely from the duties imposed on him by the law in the administration of the decedent's personal estate. As to the personalty, he was the owner and held the title for the beneficial interest of the creditors and heirs. In dealing with it he acts voluntarily and as owner, and solely in his personal capacity. In such transactions he represents no principal, and upon well-established rules he assumed all liabilities as personal in character, relying upon [487] his lien for indemnity out of the estate for expenses and liabilities incurred in a proper administration of his trust. In the disposition of real estate his duties are imposed by law and directed by the court, under the authority of the statute, and can be carried out only in the prescribed manner. He has no interest in or control over the property, except as he executes the mandates of the court to enforce the creditors' claims against the decedent's real estate. These grounds have been held to furnish the distinction between the administrator's liability in his personal and representative capacities in performing his duties as administrator of the estate.

It is contended that the instruments show on their face that the administrator assumed personal liability, in that the agreements and covenants cannot be held to bind the heirs, the only other persons concerned in the transaction, and that the notes must be treated as separate and distinct obligations from the mortgage. From the nature of the proceeding authorizing the execution of the notes and mortgage, it follows that they cover the same transaction and must be construed together. The conditions of this loan by the trust company

were submitted to the county court before the loan was authorized. The kind of notes to be given to evidence the amount loaned and when payable, as well as the amount of the interest and when due, were covered and directed by the court's orders. This furnishes a good and sufficient explanation why the notes were executed, and that they were made by the parties under the license to mortgage, and intended as an execution of the authority given and directed by the court. The notes bear evidence on their face that this was the understanding, by reciting the administrator's authority in these words: "I, Oscar H. Pierce, administrator of the estate of Sherburn Bryant, deceased, acting under an order of the county court for Milwaukee county, Wisconsin, dated July 1st, 1898, promise to pay to the Wisconsin Trust Company," etc. These are apt words to show the source of his authority [488] and that he acted in his representative and not in his personal capacity. The same considerations are applicable to the mortgage, which recites that he, as administrator of the estate of Sherburn Bryant, deceased, is a party to the instrument, and that the covenants and agreements therein were made by him as such administrator, without assuming any personal liability in the transaction.

It is, however, asserted that the purchasers of the notes obtained them as negotiable paper, and had a right to rely upon the administrator's personal liability. We cannot yield our assent to this contention, under the circumstances of this case. The notes on their face gave notice to the purchasers that they were made in a representative capacity, and that their execution was referable to the official duty of the administrator, and were limited in their effect by the authority of the county court to mortgage the decedent's real estate. With this notice before the purchasers, they were apprised of the real nature of the contract, and they, as well as others, were bound by the record in the county court where the estate had been administered. This imputes notice to the purchaser of the facts and the authority under which the instruments were executed, and thus gave them no more advantageous position than that of the trust company as the original holder. It follows that the trust company contracted with the administrator in his representative capacity to loan the amount upon the conditions submitted to the court, and accept the real estate mortgage as security for the payment of the amount due under the contract, and, in default of it, it and its assigns

can only enforce payment out of the proceeds of a sale of this real estate.

The following cases bear upon the question of an administrator's liability, in his personal and in his representative capacities, in administering and dealing with the decedent's estate: McLaughlin v. Winner, 63 Wis. 120, 53 Am. Rep. 273, 23 N. W. 402; Shontz v. Brown, 27 Pa. St. 123; Sumner v. Williams, 8 [489] Mass. 162, 5 Am. Dec. 83; Peirson v. Fisk, 99 Mich. 43, 57 N. W. 1080; Chouteau v. Suydam, 21 N. Y. 179; Thomas v. Parker, 97 Cal. 456, 32 Pac. 562; Kingsbury v. Wild, 3 N. H. 30; Van Bibber v. Reese, 71 Md. 608, 18 Atl. 892, 6 L. R. A. 332; 2 Woerner's American Law of Administration, sec. 480.

Error is assigned upon the ground that the court awarded costs in this action to defendant Oscar H. Pierce. The conclusions we have reached make it apparent that the defendant Pierce had a good defense to the claim made against him by the plaintiffs. Nor do we find grounds for criticism of his course in pleading the matter set up in the counterclaim. This course was evidently adopted to bring to the court's attention all the matters available to him under the different phases of the case presented by the proof. His action is amply justified by the findings of the trial court in awarding him the relief demanded in his counterclaim as a good and sufficient avoidance of the demands of the complaint, though we deem the counterclaim immaterial in view of his complete defense in the action upon the grounds above stated.

The defendant Ethel Bryant Chapman appeared by attorney in the proceeding in the county court wherein the court authorized the mortgage in question. She also appeared at the settlement of Mr. Pierce's final administration account, and assented to its approval and his discharge by the court. She also accepted the partition of the estate, which gave her the property in suit, subject to the mortgage. Under these circumstances she is estopped by the court's decrees from raising the question of the irregularity of the proceedings in the county court which are involved in this litigation: O'Dell v. Rogers, 44 Wis. 136; Heminway v. Reynolds, 98 Wis. 501, 74 N. W. 350. No grounds are suggested by her upon which she can rest an objection that the Wisconsin Trust Company is not a corporation and that it had no power to make the contracts in question. We think the court properly held that the trust company was

The errors assigned upon the instructions given bear upon the same question, and therefore require no further consideration.

By the Court. Judgment affirmed.

The Consideration of a Deed may be shown by parol to be entirely different from that expressed in the instrument: Moffatt v. Bulson, 96 Cal. 106, 31 Am. St. Rep. 192. See, too, note to Schemerhorn v. Vanderheyden, 3 Am. Dec. 306; Kendrick v. Life Insurance Co., 124 N. C. 315, 70 Am. St. Rep. 592; Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212; Hausman v. Burnham, 59 Conn. 117, 21 Am. St. Rep. 74; Sullivan v. Lear, 23 Fla. 463, 11 Am. St. Rep. 388; Breitenwischer v. Clough, 111 Mich. 6, 66 Am. St. Rep. 372. Thus, parol evidence is admissible to prove that the price of the land was to depend upon the number of square feet in its area, and that by reason of a mistake in computing the area a greater sum was paid than was due: Cardinal v. Hadley, 158 Mass. 352, 35 Am. St. Rep. 492.

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2. **LATERAL SUPPORT, Excavation, Liability for, When Does not Exist.**—If a person intending to excavate on his own lot gives notice thereof to the proprietor of the adjoining premises, who, to protect his property, employs another to underpin it, and in carrying out this work the wall is cracked, a tenant of the owner thereby injured has no right of recovery against the owner of the adjoining premises. (Md.) Serio v. Murphy, 316.

3. **CARE, Degree of Required in Making an Excavation.**—If the owner of a building endangered by a proposed excavation receives proper notice, the party making the excavation is responsible only for actual or positive negligence in the manner of doing the work, and is not required to use the same degree of care that a prudent man would exercise in similar circumstances. (Md.) Serio v. Murphy, 316.

4. **LATERAL SUPPORT — Excavations — Negligence — Notice — Parties Liable.**—It is the duty of one who makes an excavation on his own land, deeper than the foundation of a building on an adjoining lot, and so near to such building as to endanger it, to notify the adjoining owner of the proposed excavation, and afford him a reasonable opportunity to protect his property. A failure to discharge such duty is negligence for which an action may be maintained for the resulting injury, unless the adjoining owner had actual knowledge of such proposed excavation. This rule applies to municipalities and their contractors as well as to other persons. (Mo.) Gerst v. St. Louis, 580.

5. **LATERAL SUPPORT—Excavations—Notice.**—Publication in a newspaper of an ordinance creating a sewer district and providing for the construction of sewers, and the registering of the contract therefor, are not notice to an adjoining property owner that the city intends and is about to make excavations so near his

property as to remove his lateral support. (Mo.) Gerst v. St. Louis, 580.

6. **LATERAL SUPPORT—Excavations—Damages—Interest.**—An adjoining owner who is entitled to damages from a city and a contractor for injury to his property caused by an excavation made without notice, and which removes his lateral support, is not entitled to interest on the damages awarded him, "from the date of the injury to the date of the trial." (Mo.) Gerst v. St. Louis, 580.

Lateral Support—Landlord and Tenant.

7. **LANDLORD AND TENANT, Liability for Excavation.**—If the owner of adjacent premises in making an excavation thereon, after giving notice of his intention, causes the wall of a building to be injured thereby, the tenant of the building cannot recover of his landlord therefor, where there is nothing to show that such landlord was guilty of any negligence or failed in any duty imposed on him by law. (Md.) Serio v. Murphy, 316.

8. **LANDLORD AND TENANT, Liability for Injuries Due to an Excavation.**—A tenant cannot recover for injuries suffered to the wall of the building occupied by him from an excavation made on the adjoining premises, where the person making such excavation gave due notice of his intention to do so, and thereafter proceeded with ordinary care. (Md.) Serio v. Murphy, 316.

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AGENCY.

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ANIMALS.

1. **ANIMALS, Owner, When not Liable for Injuries Inflicted by.**—If a domestic animal is rightfully in the place where it inflicts an injury, as where a horse, being led along a public street, by kicking, injures a person lawfully there and in the exercise of due care, the owner is not liable, in the absence of negligence on his part or knowledge of any vicious propensity in the animal. (R. I.) Eddy v. Union R. R. Co., 897.

2. **CONSTITUTIONAL LAW—Police Power—Docking Horses.**—It is within the police power of the state to prohibit cruelty to animals, and within this rule the docking of a horse's tail is cruelty. (Colo.) Bland v. People, 80.

APPEAL AND ERROR.

1. **APPELLATE PRACTICE—Assignment of Error—Waiver of Objection to Decree.**—One party cannot, on appeal, object to a decree in the lower court in favor of the other party on the ground that the latter did not by his answer set up any cross-complaint nor ask for any affirmative relief, when such objection was not made in the court below, and no cross-errors are assigned on appeal. (Colo.) Bessemer etc. Ditch Co. v. Wooley, 91.

2. **APPEAL AND ERROR—Short Decision.**—Where there is a "short decision," ultimately affirmed, the court of appeals cannot presume that any fact was found not embraced within the scope of the pleadings or findings as they appear of record and the proofs upon which the decision was made, and if the conclusion of law to the effect that the plaintiff was entitled to judgment is excepted to, the judgment must be reversed if the complaint fails to allege some fact essential to the recovery, and the findings and evidence are silent on the subject. (N. Y.) Falk v. American etc. Trading Co., 778.

3. **WHERE A VERDICT is Directed Against a Party,** he is, on appeal, entitled to the most favorable inference to be drawn from the evidence. (N. Y.) Citizens' State Bank v. Cowles, 765.

4. **APPELLATE PROCEDURE—Question for Review, When Need not be Specified.**—Where an appellate division of a supreme court certifies that a question of law is involved which ought to be reviewed by the court of appeals, it need not certify what that question is. (N. Y.) Kurz v. Doerr, 716.

5. **APPELLATE PRACTICE—Final Judgment, When will not be Entered by the Supreme Court.**—A motion in a trial court for judgment notwithstanding the verdict, without a motion to change the findings of the verdict to conform to the evidence, does not make it proper for the supreme court, on reversing the judgment, to dispose of the case finally without a new trial. (Wis.) Standard Mfg. Co. v. Slot, 1016.

6. **APPELLATE PRACTICE.—Final Judgment, When may be Entered in the Supreme Court.**—Where, in the trial court, a party moves to strike out a negative and insert an affirmative in the answer given by the jury, and such motion should have been granted, and if granted must have disposed of the case, the supreme court, on appeal, may order the change moved for to be made, and render final judgment accordingly. (Wis.) Ehleiter v. Milwaukee, 1027.

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BANKS AND BANKING.

1. **BANKS AND BANKING—Savings Bank—Care Which must be Exercised in Permitting the Withdrawal of Deposits.**—The only practicable general rule to which savings banks can safely be held in permitting the withdrawal of deposits of deceased persons whose death is not known to such banks and whose pass-books are presented is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. (N. Y.) Kelley v. Buffalo Savings Bank, 720.

2. **BANKS AND BANKING—Savings Banks, What is Want of Due Care by in Paying Out Deposits.**—If, when the pass-book of a deceased depositor is presented, though his death is unknown to the bank, it pays out deposits on checks when a critical examination of the signature on such checks and the signature of the deceased entered in the bank's signature-book would disclose that the signatures on the checks were not genuine, and the officers of the bank make no critical examination or physical comparison of the signatures on the checks and that on its signature-books to ascertain the genuineness of the signatures on the checks or the identity of the person presenting them, the bank and its officers do not exercise ordinary care, and the representatives of the decedent may recover without regard to the withdrawals thus permitted, although there was no such difference between the signatures upon such checks and that on the signature-book as to create doubt or misgivings concerning the genuineness of the signatures on the checks in the mind of a competent and reasonably careful bank officer when presented with the bank-book by a person unknown to him. (N. Y.) Kelley v. Buffalo Savings Bank, 720.

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BONDS.

A JOINT AND SEVERAL BOND Given by Two or More Principals has the Same Effect as if all had given a joint and each had given a separate bond. (R. I.) Municipal Court v. Whaley, 390.

See Municipal Corporations, 32-36.

BOOKS OF ACCOUNT.

See Evidence, 6-8.

BOOTBLACK STANDS.

See Constitutional Law, 14.

BURGLARY.

AN INDICTMENT for Attempting a Burglary must not only allege the attempt and intent, but it is essential that it should also allege the overt acts relied upon and constituting the attempt. (Me.) State v. Doran 278.

CARRIERS.

Carriage of Goods Generally.

See Railroads, 8-16.

1. **CARRIER—Character of Freight—Notice to Employé.**—The rule that where a bill of lading issued to a consignor upon his false representation as to the character of the goods, the carrier may hold them at their destination for additional charges because they belong to a class upon which higher freight rates may be exacted, does not apply if the carrier's employé who classified the goods saw them as they were being loaded on the car. (Ill.) Illinois Central R. R. Co. v. Seitz, 108.

2. **CARRIER—Discrimination in Favor of Shipper—Additional Charges.**—If a carrier makes an unlawful discrimination in favor of a shipper by contracting to carry goods at a lower rate than they should bear, it cannot, after the goods have reached their destination, charge against them an additional amount of freight sufficient to bring the total charge up to the proper rate. (Ill.) Illinois Central R. R. Co. v. Seitz, 108.

2a. **CARRIERS—Termination of Carriage.**—If a carrier has not provided a freight-house for the storage of merchandise and expects consignees to unload their goods directly from its cars, the transportation of grain cannot be considered as ended or the carrier released until the consignee has been notified and the car placed where it can be conveniently unloaded. (Mass.) Bachant v. Boston etc. R. R. 408.

Limiting Liability.

3. **CARRIERS—Contract for Through Transportation—Liability Beyond Own Line.**—A common carrier is not bound to transport goods beyond its terminus, and it may therefore stipulate by special contract, not supported by any consideration, that it shall not be liable for loss after the goods have passed beyond the limits of its own line and upon the line of another. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

4. **CARRIERS—Contract for Through Transportation—Limitation upon Liability.**—If a carrier, receives, transports and delivers a shipment of livestock in good condition and on practically schedule time to a connecting and forwarding line, the initial carrier is not liable for the damaged condition of the stock, when delivered to the consignee, if the contract of carriage especially stipulates that such carrier shall not be liable after delivery to the connecting carrier. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

5. **A COMMON CARRIER may, by Agreement, Limit to a reasonable extent his common-law liability, but not his liability, for the consequences of his own negligence.** (Me.) Fisher v. Boston etc. R. R. Co., 283.

6. **CARRIERS—Limitation of Liability.**—A common carrier may by special contract limit its liability for loss or damage to freight not caused by its own negligence, but the carrier must at the same time hold itself in readiness to transport the freight, with or without such limitation, and allow the shipper a reasonable and bona fide alternative between the two modes of shipment. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

7. **CARRIERS—Special Contract Limiting Liability.**—If a carrier seeks to avoid liability for damage to freight, by virtue of a

special contract of carriage, the testimony of shippers to the effect that they had no knowledge of any bill of lading for the shipment of freight other than the special contract under which the shipment in suit was made, and did not know of any other contract under which shipments could be made, and had never been offered any other or different contract in their experience as shippers, is relevant to the issue whether the carrier had an ordinary common-law contract of shipment, and held itself in readiness to give the shipper the benefit of such contract if he so desired. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

8. **CARRIERS—Avoidance of Contract Limiting Liability.**—A shipper cannot avoid the limitations imposed by a special contract of carriage by showing that he executed it hurriedly, or without due care, nor by showing that he was ignorant of the provisions of the contract. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

9. **CARRIERS—Contracts Limiting Liability.**—A special contract limiting the liability of a common carrier for loss or damage, not caused by his own negligence, to be valid must be fairly obtained, just and reasonable, and based upon a sufficient consideration. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

10. **CARRIERS — Contract Limiting Liability — Evidence of Amount of Loss.**—If a special contract for the carriage of livestock fixing their value and limiting liability for their loss, is assailed as void for want of consideration and other causes, evidence of the market value of the stock lost is admissible, as that value, and not the value fixed by the contract, is the measure of recovery, if the contract is held void. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

11. **CARRIERS—Validity of Special Contract Limiting Liability.** A special contract for the shipment of livestock, fixing their value per head at one-third of their real value, is unreasonable and void. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

12. **CARRIERS—Burden of Proof as to Cause of Loss.**—In the absence of a special contract limiting his liability, a carrier must affirmatively show that loss of goods shipped was caused by some cause for which he was not responsible, as by the act of God or the public enemy, in order to avoid liability, but where there is a limited liability contract, and the loss falls within one of the excepted causes, the burden of proof is upon the shipper to show negligence on the part of the carrier. (Tenn.) Nashville etc. Ry. Co. v. Stone, 955.

Stoppage in Transitu.

13. **STOPPAGE IN TRANSITU, Right of, When Lost.**—If a vendee of property takes possession of and ships it by railroad, receiving a non-negotiable bill of lading, which he subsequently assigns to a purchaser or pledgee in good faith and for value, the vendor has thereafter no right of stoppage in transitu. (Md.) National Bank v. Baltimore etc. R. R., 321.

Conversion by Carrier.

14. **CARRIER—Estoppel.**—In Trover Against a Carrier for goods sold to pay additional freight charges, the carrier is estopped to claim that the action cannot be maintained because the plaintiff is neither the consignor, the consignee, nor the assignee of the bill of lading, if the refusal to deliver the goods to him was placed solely on the ground the additional freight was not paid, the carrier's agent being advised that the goods belonged to the plaintiff. (Ill.) Illinois Central R. R. Co. v. Seitz, 108.

Bills of Lading.

15. **CONFLICT OF LAWS.**—A bill of lading evidencing a contract between a shipper and a railroad company issued in Virginia has such qualities as are imposed upon it by the laws of that state. (Md.) National Bank v. Baltimore etc. R. R., 321.

16. **CONFLICT OF LAW—Presumption as to Laws of Another State.**—Where there is no evidence as to the laws of another state in which a bill of lading was issued, the court will presume that, as to bills of lading, the common law prevails in that state. (Md.) National Bank v. Baltimore etc. R. R., 321.

17. **CARRIERS.—Bills of Lading are not by the Common Law Negotiable** in the unrestricted sense, but are quasi negotiable only. (Md.) National Bank v. Baltimore etc. R. R., 321.

18. **CARRIERS.—The Common-law Negotiability of a Bill of Lading may be Still Further Limited and Qualified** by the insertion therein of appropriate terms wholly destroying all negotiability. (Md.) National Bank v. Baltimore etc. R. R., 321.

19. **CARRIERS.—A Non-negotiable Bill of Lading may be Assigned** and the assignee takes a valid title to it, subject to the equities existing between the original parties, of which, if there are any, he is held to have notice. (Md.) National Bank v. Baltimore etc. R. R., 321.

20. **CARRIERS—Bills of Lading—Assignee's Rights.**—The assignee of a non-negotiable bill of lading is not subject to the equities of third persons whose claims do not appear upon and are in no way connected with the bill. (Md.) National Bank v. Baltimore etc. R. R., 321.

21. **CARRIERS.—The Transfer of a Bill of Lading is the Transfer of the Thing Described in It,** and whatever equities exist between the parties to it, with respect to the title to such property, follows it into the hands of the assignee, unless some other legal or equitable principle intervenes to preclude the assertion of prior rights against a bona fide assignee for value. (Md.) National Bank v. Baltimore etc. R. R., 321.

22. **CARRIERS—Bill of Lading—Assignee's Right as Against Vendor of Property.**—If property is sold, and the vendee ships it by railroad, receiving a non-negotiable bill of lading, the assignee of such bill for value, in good faith, is not chargeable with notice of the rights of such vendor, whether or not he reserved title until payment of the purchase price should be made. (Md.) National Bank v. Baltimore etc. R. R., 321.

23. **CARRIERS—Bill of Lading, Assignee of, When not Affected by Fraud of His Assignor.**—Though the vendee of property acquires possession thereof by fraud of the vendor, yet if the former ships the property and receives a bill of lading therefor, the assignee of such bill in good faith and for value acquires title to the property represented thereby free of the title and equities of such vendor. (Md.) National Bank v. Baltimore etc. R. R., 321.

Connecting Carriers.

See ante, 3-12.

24. **AN INTERMEDIATE Carrier is Liable to a Shipper** for any loss occurring through its fault after the goods have come into its possession, and the liability of the former carriers in the route terminates when they have respectively transported across their lines

and delivered the freight to the next connecting carrier. (Me.) Fisher v. Boston etc. R. R. Co., 283.

25. **CONNECTING CARRIER, Duty of, After Its Carriage was Terminated.**—If a connecting carrier has transported goods over its line to its terminus and has become unable to deliver them to the next carrier, the duty still rests on it as a forwarder to exercise reasonable care and diligence to prevent unnecessary loss to the goods and to save unnecessary costs to the owner in storage or transportation. Such forwarder should exercise the same degree of care to prevent loss or unnecessary expense that a prudent owner would have exercised in the same situation. (Me.) Fisher v. Boston etc. R. R. Co., 283.

26. **A CONNECTING CARRIER Unable to Deliver Goods to the Next Designated Carrier is Under the Duty** of at once notifying the shipper or consignee, and the failure to give such notice will render such carrier liable for any loss or injury resulting therefrom. (Me.) Fisher v. Boston etc. R. R. Co., 283.

27. **CONNECTING CARRIER, When may not Select Another than the Designated Route.**—If a connecting carrier is unable to deliver goods to the next connecting carrier, and can properly care for and hold them until the shipper can be communicated with, it is not justified in selecting another route without notice and instructions from such shipper. (Me.) Fisher v. Boston etc. R. R. Co., 283.

28. **A CONNECTING CARRIER, Finding Itself Unable, on Account of a Strike to Deliver a Shipment** of potatoes to the next designated carrier, should communicate with the shipper, and, if without such communication, it selects another carrier and forwards the goods at increased cost, it is liable to the shipper therefor, if he could have disposed of his property where it was, had he been given notice, and an opportunity to do so, and thus save himself from such increased cost. (Me.) Fisher v. Boston etc. R. R. Co., 283.

Passengers.

29. **CARRIERS—Passenger, When not in the Exercise of Due Care.** A passenger who, after the name of his station is called, and while the train is moving slowly, leaves the car and stands upon the first of four steps leading from the side of a platform at the end of the car, and, while there, is thrown to the ground and injured by the collision of the car and a team owned by a newsdealer, is not in the exercise of due care, and can neither recover from the railway nor from the newsdealer. (Mass.) Flether v. Boston etc. R. R. Co., 414.

30. **CARRIERS—Passenger, When not Justified in Leaving Moving Train.**—Even though the announcement of a passenger's station may be treated as an invitation to leave the car, it is not an invitation to leave it while in motion. (Mass.) Fletcher v. Boston etc. R. R. Co., 414.

31. **TORT-FEASORS, Liability of, When not Joint.**—If a passenger of a railway receives an injury from the collision of the train with a truck owned by a newsdealer, the railway company and the newsdealer are not liable as joint tort-feasors, though both are negligent. (Mass.) Fletcher v. Boston etc. R. R. Co., 414.

Baggage.

32. **CARRIERS—Liability for Baggage.**—In the carriage of a passenger's baggage, the carrier assumes the full responsibility of a common carrier of goods, and becomes an insurer of its safety, against every accident which is not the act of God or of the public

enemy, or the fault of the owner or passenger himself. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

33. **CARRIERS—Liability for Hand Luggage.**—A railroad company is not liable as an insurer for the safety of hand baggage or luggage carried by passengers in day coaches, and kept in their custody and control during the entire trip. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

Sleeping-car Companies.

34. **RAILROADS.**—Porters on Sleeping-cars are the servants of the railroad companies on whose trains they work. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

35. **RAILROADS.**—Employés of Sleeping-car Companies are employés of the railroad companies, and the later are responsible for the conduct of such employés. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

36. **RAILROADS — Passengers in Sleeping-cars — Liability for Hand Baggage.**—Unless a passenger on entering a sleeping-car assumes and retains the exclusive possession and control of his hand baggage, and either directly or impliedly denies any right of possession or custody to the employés of the road, such baggage must be considered as being in their possession, and the railroad company must be treated as insuring its safety. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

37. **RAILROADS—Liability for Hand Baggage of Passenger in Sleeping-car.**—Hand baggage that a passenger takes with him into a sleeping-car, and does not keep about his person or in his hand, nor take with him when he retires to his berth, but which is deposited under the berth, or over it, or at any other convenient place, when the passenger retires for sleep, must be considered as in the custody of the employés of the road, and the railroad must be treated as insuring its safety. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

38. **RAILROADS—Loss of Hand Baggage—Presumption of Negligence.**—If no explanation is given for the loss of the hand baggage of a passenger in a sleeping-car, the loss is presumed to have occurred through the negligence of the railroad company or by theft, and the company, as an insurer, is liable for the loss. (Tenn.) Nashville etc. Ry. Co. v. Lillie, 947.

See Railroads; Street Railroads.

Note.

Carrier. See Bills of Lading.

CHARITIES.

1. **CHARITIES, Public, When and for What Time Created.**—Where property is devised to executors charged with a trust to hold and manage it for twenty-five years, and accumulate the income, and then to dispose of the property and its accumulation for the purpose of founding a hospital, a trust for charitable uses is created, and the instrument creates from the death of the testator a public charity. (Mass.) Codman v. Brigham, 394.

2. **CHARITIES, What are.**—A Christian Church lawfully existing is a charity in the sense of the statute of 43 Elizabeth, chapter 6. (R. I.) Gladding v. Saint Matthew's Church, 904.

3. **WILLS—Charitable Bequest—Certainty in Trust.**—A will devising the testatrix's property to her executor to be by the latter dis-

tributed "to the poor in his discretion" creates a gift sufficiently definite to be enforceable under a statute requiring that charitable gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. (Ky.) Thompson v. Brown, 194.

See Wills, 23.

CHATTEL MORTGAGES.

CHATTEL MORTGAGES—Removal of Property to Another State—Registration—Priorities.—A chattel mortgage executed and recorded in another state embracing property then there but afterward removed to Tennessee, is not entitled to registration in the latter state so as to give the mortgagee, on the ground of constructive notice, priority over the lien of resident attaching creditors of the mortgagor. (Tenn.) Snyder v. Yates, 941.

See Records.

CHECKS.

See Bills and Notes.

CHILD LABOR.

See Corporations, 5-8.

CLUBS.

1. POLITICAL CLUB—Right to Inspect List of Membership. The list of members of a political club should, at proper times, be open to the inspection of all members, thereby affording to each of them an opportunity to aid in carrying out the object of the organization as set forth in its charter. (Pa. St.) McClintock v. Young Republicans of Philadelphia, 784.

2. POLITICAL CLUB—Mandamus—Exhausting Remedies Within Club.—Where a member of a political club has demanded of the directors and the officer having the custody of the list of membership of the club the right to inspect such list, and has been refused, he has laid a sufficient ground for an application for a writ of mandamus to enforce his right of inspection. (Pa. St.) McClintock v. Young Republicans of Philadelphia, 784.

CODICIL.

See Wills, 15.

CONFESSIONS.

See Criminal Law, 13.

CONFLICT OF LAWS.

1. CONFLICT OF LAW—Contracts of Another State—Comity. If parties to a contract made in one state are impleaded in the courts of another, the latter will expound and enforce the contract according to the law of the state where it was made, if such law is properly pleaded and proven, but such courts will not, on a question of priority of lien, set aside their own rules and the statutes

of their state to the prejudice of its own citizens. (Tenn.) Snyder v. Yates, 941.

2. **STATUTES—Extraterritorial Force—Comity.**—The statutes of a state have of themselves no extraterritorial force. Whatever effect they have in other states, they have by virtue of the laws of such states or under the doctrine of comity. (Tenn.) Snyder v. Yates, 941

See Bills and Notes, 2; Carriers, 15, 16; Records.

CONSTITUTIONAL LAW.

In General.

1. **MAGNA CHARTA—Rights Acquired by the Colonists.**—The rights granted by Magna Charta relating to cities, boroughs and towns were brought over by the colonists, and the liberties and customs of localities reappeared on a novel and wider basis in the town meetings of New England and the various colonies, including New York. (N. Y.) People v. State Bd. of Tax Commrs., 674.

2. **LEGISLATIVE DEPARTMENT, Control of the Courts Over.**—Legislative acts within the power of the legislative body are not subject to revision or control by the courts, on the ground of inexpediency, injustice, or impropriety. (Wis.) Tilly v. Mitchell etc. Co., 1007.

3. **CONSTITUTIONAL LAW.—The Test of Legislative Power is** constitutional restriction; what the people have not said in the organic law their representatives shall not do, they may do. (Pa. St.) Russ v. Commonwealth, 825.

4. **CONSTITUTIONAL LAW.—Every Presumption is in Favor of the Constitutionality of an Act of the Legislature,** and if the constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction. Still, it is no less their duty to adjudge a statute void if it is in conflict with the real intent of the fundamental law when considered in the light of history in all its aspects. (N. Y.) People v. State Bd. of Tax Commrs., 674.

5. **CONSTITUTIONAL LAW—Creating Crime and Providing Punishment.**—It is competent for the legislature to provide such punishment as in its judgment the offense made criminal by statute warrants, and unless the punishment inflicted can be regarded as cruel or unusual, the courts cannot interfere. (Colo.) Bland v. People, 80.

Appropriation of Money.

6. **STATUTORY CONSTRUCTION—Appropriation of Money.**—If both Houses of the legislature resolve to attend in a body the dedication of a certain monument, and that "all matters pertaining to such attendance be referred to the committee of military affairs of the Senate and House," such committee has authority to contract for edibles, liquors and cigars for the members of the legislature while attending the dedicatory exercises. (Pa. St.) Russ v. Commonwealth, 825.

7. **CONSTITUTIONAL LAW—Appropriation for Entertainment of Legislature.**—The constitution of Pennsylvania does not prohibit the legislature from attending in a body the dedication of a monument to a distinguished citizen, and providing that the expense of the legislators for edibles, liquors, cigars, etc., during the attendance at the dedicatory exercises, shall be paid from the public funds. (Pa. St.) Russ v. Commonwealth, 825.

and delivered the freight to the next connecting carrier. (Me.) Fisher v. Boston etc. R. R. Co., 283.

25. **CONNECTING CARRIER, Duty of, After Its Carriage was Terminated.**—If a connecting carrier has transported goods over its line to its terminus and has become unable to deliver them to the next carrier, the duty still rests on it as a forwarder to exercise reasonable care and diligence to prevent unnecessary loss to the goods and to save unnecessary costs to the owner in storage or transportation. Such forwarder should exercise the same degree of care to prevent loss or unnecessary expense that a prudent owner would have exercised in the same situation. (Me.) Fisher v. Boston etc. R. R. Co., 283.

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a character as to reasonably excuse one from reading a proposed written contract, and he was thereby induced to sign it without knowledge of its contents, he may rescind it by acting seasonably. (Wis.) Standard Mfg. Co. v. Slot, 1016.

2. **CONTRACTS, Signing without Reading, When Inexcusable.**—One who, being of average intelligence and experience, and requested to read a contract, nevertheless signs it without reading, cannot rescind it on the ground that the agent of the other party falsely represented its contents, when a casual glance at a few lines in close proximity to the signature must have acquainted the signer with the fact that the contract was not of the character which he claims it was represented to be. (Wis.) Standard Mfg. Co. v. Slot, 1016.

3. **CONTRACT, Presumption of Knowledge of Contents of.**—One who signs or accepts a written contract, in the absence of fraud or mistake, is conclusively presumed to know and assent to its contents. (Wis.) Standard Mfg. Co. v. Slot, 1016.

4. **CONTRACT, Signing without Reading.**—The fact that false representations are made in respect to a paper is not necessarily sufficient to excuse a person for affixing his signature in ignorance of its contents, unless under all the circumstances, in view of his duty to give reasonable attention to his business interests, the false representations were reasonably calculated to and did induce him not to make an investigation which he would otherwise have made. The signer cannot excuse himself by the mere plea that he was busy or was habitually neglectful under such circumstances. (Wis.) Standard Mfg. Co. v. Slot, 1016.

Time as Essence.

5. **TIME IS NOT OF THE ESSENCE of a Contract in Equity,** and this is especially true of time specified for the payment of money. (Ark.) Vance v. Newman, 42.

Restraint of Trade.

See Monopolies.

6. **CONTRACT in Restraint of Trade—Lease of Electric Plant.**—Where a corporation engaged in generating and furnishing electricity for public and private use leases its machinery and appliances for ten years to a rival corporation in the city, agreeing not to furnish light and power to public or private consumers in the city for that time, and not to dispose of any of its machinery or appliances retained by it for the purpose of generating light and power, the lease is in contravention of public policy, and no action can be maintained thereon for rent by the lessor or his assignee. (Kan.) Keene Syndicate v. Wichita Gas etc. Co., 164.

7. **RESTRAINT OF TRADE—Coal Mining and Shipping.**—A contract by which the owner of coal lands, coal mines and coal boats sells them and agrees not to engage "in the business of mining, marketing, or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries for the period of ten years," is not in violation of the public policy of Pennsylvania, notwithstanding the purchaser has similar contracts with a large number, but not all, of the coal operators and shippers in the Monongahela valley in Pennsylvania. (Pa. St.) Monongahela River etc. Co. v. Jutte, 812.

CORPORATIONS.

Consolidation.

1. **BY THE CONSOLIDATION of Two Corporations a new corporation is formed and the old corporation ceases to exist. (R. I.) Gladding v. Saint Matthew's Church, 904.**

Directors Dealing with Shareholders.

2. **CORPORATIONS—Directors' Trusteeship for Stockholders.—The managing officers of a corporation are not only trustees of the corporate entity and property, but they are also, to some extent, and in many respects, trustees for the shareholders. (Kan.) Stewart v. Harris, 178.**

3. **CORPORATIONS—Directing Dealing with Shareholders.—The fact that the directors and managing officers of a corporation are quasi trustees for the stockholders does not prevent them from dealing with the latter; the only restriction is, that in such dealing their conduct be fair, open and above reproach. (Kan.) Stewart v. Harris, 178.**

4. **CORPORATIONS—Directors Purchasing Stock from Shareholders.**—Before a director or managing officer of a corporation, having knowledge of the condition of its affairs, can rightfully purchase the stock of one not actively engaged in the management of the concern, he must inform such stockholder of the true condition of corporate affairs. (Kan.) Stewart v. Harris, 178.

Penalties—Employment of Children.

5. **CORPORATIONS—"Persons"—Penal Statute.**—In a penal statute intended to inhibit an act, the word "person" prima facie includes corporations if they are within the spirit and purpose of the act. (Colo.) Overland Cotton Mill Co. v. People, 74.

6. **CORPORATIONS—Penalties.**—A statute prohibiting the employment of children under a certain age in mills and factories, and providing a penalty for its violation, applies to corporations, and the fact that it provides for imprisonment if the fine imposed is not paid does not exempt corporations from the penalty, as the fine may be collected through the means provided for the collection of a money judgment. (Colo.) Overland Cotton Mill Co. v. People, 74.

7. **CORPORATIONS—Penalty—Liability for Act of Agent.—If a corporation, by its agent having authority to employ and discharge servants, violates a penal statute in employing a child under the prohibited age, the corporation is guilty and liable for the penalty provided by the statute, although it has instructed its agent not to employ children who are under the prohibited age. (Colo.) Overland Cotton Mill Co. v. People, 74.**

8. **CORPORATIONS—Penalties—Liability of Agent.—If a statute prohibits the employment of children under a certain age in mills, and imposes a penalty for its violation, the assistant superintendent of a mill, with authority to employ and discharge servants is presumed to have known that a minor under the prohibited age was employed in the mill, if such was the case, and hence such superintendent may himself be held guilty of having violated the statute. (Colo.) Overland Cotton Mill Co. v. People, 74.**

Agents.

9. **CORPORATIONS—Liability for Act of Agent.—A corporation is liable for the act of its agent, done within the scope of his gen-**

eral authority, although such act is forbidden by the corporation. (Colo.) Overland Cotton Mill Co. v. People, 74.

10. **CORPORATIONS—Knowledge of Agent.**—An agent of a corporation is presumed to have that knowledge of its affairs particularly under his control which, by the exercise of due diligence, he would have ascertained. (Colo.) Overland Cotton Mill Co. v. People, 74.

11. **CORPORATIONS—Liability of Agent for Criminal Offense.**—An agent or officer of a corporation, through whose act it commits an offense against the law, is himself also guilty of the same offense. (Colo.) Overland Cotton Mill Co. v. People, 74.

Foreign Corporations.

12. **FOREIGN CORPORATIONS.—The Personal Liability of a Stockholder in a Colorado Corporation** cannot be enforced by a bill in equity in Massachusetts to which the corporation and the other stockholders are not parties. (Mass.) Clark v. Knowles, 376.

13. **FOREIGN CORPORATIONS.—A Bill in Equity to Enforce the Personal Liability of Stockholders** in a corporation on a claim not reduced to judgment cannot ordinarily be sustained beyond the state where it was organized. (Mass.) Clark v. Knowles, 376.

14. **CONFLICT OF LAWS—Laws of Another State, When will not be Followed.**—The mode of procedure to enforce the liability of stockholders of a foreign corporation depends on the law of the state where the remedy is sought. That state will not give effect to the provisions of a statute of the state where the corporation was organized, if it calls for remedies which, according to the rules of practice of the law of the forum, cannot be given for want of necessary parties. (Mass.) Clark v. Knowles, 376.

See Franchises; Wills, 23-25.

COSTS.

See Executors and Administrators, 18.

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Note.

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COURTS.

STARE DECISIS.—Principles are not Established by What was Said, but by what was decided, and what was said is not evidence of what was decided unless it relates directly to the question presented for decision. General expressions must be taken in connection with the cases in which those expressions were used. (N. Y.) People v. State Bd. of Tax Commrs., 674.

CRIMINAL LAW.

Attempt to Commit Crime.

1. **ATTEMPT to Commit a Crime.**—To constitute an attempt to commit a crime, there must be something more than mere intention

or preparation. There must be some act moving directly toward the commission of the offense after the preparations are made. (Me.) State v. Doran, 278.

Trial and Procedure.

2. **CRIMINAL PROCEEDINGS, What are not.**—A proceeding for the search for and seizure and destruction of intoxicating liquors kept in a prohibited district to be sold contrary to law is a civil and not a criminal proceeding, and the preponderance of evidence is sufficient to sustain it. (Ark.) Kirkland v. State, 25.

3. **CRIMINAL TRIALS—Using Docked Horse—Evidence.**—In a prosecution for using an unregistered docked horse it is not necessary to a conviction to prove that the horse is not registered, if it clearly appears that the docking was done after the expiration of the time within which the animal might have been registered. (Colo.) Bland v. People, 80.

4. **CRIMINAL LAW—Effect of Arrest of Judgment.**—The allowance of a motion in arrest of judgment does not operate as an acquittal, but only places the defendant in the same situation in which he was before the prosecution was begun. (Kan.) State v. Stephenson, 171.

5. **CRIMINAL LAW—Presence of Accused—Presumption.**—If the record shows that the accused was present in court and waived formal arraignment, and that at the close of the evidence for the prosecution he demurred thereto, it must be presumed on appeal that he was present during the whole trial. (Mo.) State v. Brock, 625.

Evidence of Other Crimes.

6. **CRIMINAL LAW—Evidence of Other Crimes.**—The general rule is that evidence of offenses other than that for which the defendant is on trial cannot be introduced, but to this rule there are well-established exceptions. (Tenn.) Sykes v. State, 972.

7. **CRIMINAL LAW—Evidence of Other Crimes—Sexual Offenses.** In prosecutions for sexual crimes, it is competent to introduce evidence of both prior and subsequent acts of like nature in corroboration or explanation of the act relied upon for conviction, or for the purpose of showing the relation and mutual disposition of the parties or guilty knowledge or intent on the part of the accused. (Tenn.) Sykes v. State, 972.

8. **CRIMINAL LAW—Evidence of Other Acts in Prosecutions for Violation of Age of Consent Statutes.**—In prosecutions for sexual intercourse in violation of an age of consent statute, evidence of both prior and subsequent acts of like nature, by the parties is admissible in corroboration or explanation of the act relied upon for conviction. (Tenn.) Sykes v. State, 972.

Confessions.

9. **EVIDENCE.—A Confession is a Voluntary Acknowledgment of Guilt, and an Admission,** though not amounting to a confession, must be regarded as in the nature of one if it has a vital bearing upon a highly important link in the chain of circumstantial evidence relied upon by the prosecution. It should be excluded from evidence if made under circumstances which would exclude a confession. (R. I.) State v. Nagle, 864.

10. **EVIDENCE.—A Confession, to be Admissible,** must be free and voluntary; that is, must not be extracted by any sort of threat

or violence, nor obtained by any direct or implied promise, however slight, nor under the exertion of any improper influence. (R. I.) State v. Nagle, 864.

11. **EVIDENCE—Confessions, When not Deemed Voluntary.**—If a person accused of murder and in charge of an officer is told by him that the truth, whatever it might be, ought to be told; that it always was best, except where it would be the means of conviction, and then he should prefer it if it was his case, that there was ample proof that she had bought the revolver with which the crime had been committed, and that she might as well say whether or not she had bought it, her subsequent admission to him during the same conversation as to her purchase of such weapon cannot be deemed voluntary, because what he said tended to convey to her mind that she might gain some advantage by admitting that she bought the weapon. (R. I.) State v. Nagle, 864.

12. **EVIDENCE.—A Confession is not Admissible if Made to an Officer,** where it is in response to a request or admonition given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession. (R. I.) State v. Nagle, 864.

13. **EVIDENCE.—A Confession is not Inadmissible Solely on the Ground** that it was made by the prisoner to an officer in whose custody he was. (R. I.) State v. Nagle, 864.

Indeterminate Sentence.

14. **CONSTITUTIONAL LAW—Indeterminate Sentence.**—The statute of Kansas providing for the imposition of indeterminate sentences and the parole and release of prisoners is not unconstitutional as encroaching upon the judicial and executive powers of the courts and the governor. (Kan.) State v. Stephenson, 171.

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evidence of, test to determine admissibility of, 980.
evidence of, to affect the credibility of a witness, 1005.
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evidence of, to corroborate other testimony, 993.
evidence of, to rebut inference of innocent intent, 991, 997.
evidence of, to show a common scheme or system indicating intent, 1000.
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evidence of, to show identity of the person on trial, 984.
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CRUELTY TO ANIMALS.

See Animals, 2.

CURTESY.

See Adverse Possession.

CY PRES.

See Trusts, 6, 7.

DAMAGES.

1. JURIES—Excessive Verdicts.—If there is abundant testimony to sustain the finding of the jury as to damages in a per-

sonal injury case caused by negligence, the verdict will not be set aside as excessive. (Ky.) Shinkle v. McCullough, 249.

2. **DAMAGES.**—Interest is not recoverable on damages in actions ex delicto, where no pecuniary benefit can accrue by reason of the injury. (Mo.) Gerst v. City of St. Louis, 580.

See Municipal Corporations, 24.

DECLARATIONS.

See Evidence, 10-12.

DEEDS.

In General.

1. **DEEDS—Preliminary Agreements, Purposes for Which do not Merge.**—The rule that a preliminary agreement for the sale of real property merges in the subsequent deed, and that parol evidence is not receivable to contradict it, does not apply as to the amount of the consideration, and a grantee may therefore show that this amount, through a mistake, was incorrectly computed, and recover the amount of a resulting overpayment. (Wis.) Butt v. Smith, 1039.

2. **DEEDS—Life Estate or Fee Simple.**—If the granting clause of a deed contains no words of limitation in respect to the nature and character of the estate conveyed, and standing alone creates a fee simple in the grantee, but the habendum clause reads, "To have and to hold unto the said grantee and the heirs of her body forever," the instrument conveys a life estate only, with a remainder in fee to the heirs of the body of the grantee. (Mo.) Miller v. Dunn, 537

Registration.

3. **DEEDS—Record of as Notice.**—If the name of one person is inserted in a deed as the grantor, but it is signed, acknowledged and delivered by another person not mentioned in the body of the deed, the record thereof is not constructive notice to a subsequent purchaser that it is the deed of the person who signed it. (Miss.) Marx v. Jordan, 457.

Quitclaim Deeds.

4. **A QUITCLAIM DEED Conveys All Title of the Grantor Free from All Equities Against Him** if the grantee is a purchaser for valuable consideration, without notice. (Mass.) Livingstone v. Murphy, 400.

5. **A QUITCLAIM DEED does not Carry upon Its Face Notice** of a doubtful title. It no more implies a defect of title than a deed of bargain and sale which is supported by a covenant of warranty. (R. I.) Babcock v. Wells, 848.

6. **A QUITCLAIM DEED Carries All the Interest of the Grantor.** (R. I.) Babcock v. Wells, 848.

7. **A QUITCLAIM DEED does not Charge the Grantee with Notice that the Grantor's Estate is Subject to an Equity in favor of another.** (R. I.) Babcock v. Wells, 848.

See Husband and Wife; Vendor and Vendee.

Note.

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of motive, 986.
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DEVISE.

See Wills.

DIVORCE.

1. DIVORCE—Desertion—Support of Family.—Although a husband continues to provide for the support of his family after separating from them, his conduct may constitute the matrimonial offense of desertion. (N. J. Eq.) Power v. Power, 653.

2. DIVORCE—Desertion—Agreement for Separation.—A husband may be guilty of willful, continued and obstinate desertion, notwithstanding articles of separation are signed after he deserts his wife, if he knows that she dissents from the separation, and he is determined to continue it. (N. J. Eq.) Power v. Power, 653.

3. DIVORCE—Custody of Child, When Awarded to Mother.—When a divorce is granted a woman on the ground of desertion, the custody of a boy of ten years may be awarded her, notwithstanding possible material advantages to be secured by awarding the custody of the child to his father. (N. J. Eq.) Power v. Power, 653.

DOCKING HORSES.

See Animals, 2; Constitutional Law, 11-13.

EASEMENTS.

1. PRIVATE WAYS, Presumption as to the Use of.—The use of a private way by the public is presumed to be permissive only. (Mass.) Weldon v. Prescott, 413.

2. PRIVATE WAYS, Liability to Persons Injured in.—One using a private way for his own business on the property of another is a mere licensee, and cannot recover for injuries suffered from falling into a hole or excavation filled with hot water. (Mass.) Weldon v. Prescott, 413.

EJECTMENT.

1. EJECTMENT—Possession.—Although a cause of action in ejectment accrued fifteen years before suit brought, that fact is immaterial if there has been no such open, actual, unbroken adverse possession as created title in defendant by limitation. (Mo.) Ables v. Webb, 610.

2. EJECTMENT—Equitable Title.—A person must proceed in equity to enforce his equitable rights, and is not allowed in ejectment to recover on a mere equity, although he may set up such title as an equitable estoppel to preclude the defendant of the benefit of a given conveyance. (Mo.) Ables v. Webb, 610.

ELECTRICITY.

See Telegraphs and Telephones, 2.

EMBEZZLEMENT.

See Larceny, 3.

Note.

Embezzlement, other crimes, evidence of, in prosecutions for, 996, 1001.

EMINENT DOMAIN.

1. **EMINENT DOMAIN.—The Quantity of Interest** which a railroad corporation obtains in land taken under the power of eminent domain is that which the statute conferring the power authorizes it to acquire; the legislature may authorize the taking of a fee, or any less estate, in its discretion. (N. J. Eq.) Currie v. New York Transit Co. etc., 647.

2. **EMINENT DOMAIN—When Owner Retains no Interest.—If a Railroad Corporation** takes land under the power of eminent domain conferred upon it by the general railroad law of New Jersey, it becomes vested with the whole present estate in the land, and the former owner retains no interest therein for the protection of which he is entitled to invoke the aid of a court of equity. (N. J. Eq.) Currie v. New York Transit Co. etc., 647.

EMPLOYMENT OF CHILDREN.

See Corporations, 5-8.

ENTIRETIES.

See Husband and Wife, 2, 3.

EQUITY.

1. **EQUITY JURISDICTION—Injunction—Quieting Title.**— If one of the objects of an action is to enjoin interference with the use of water rights, this is sufficient to give a court of equity jurisdiction, and having obtained jurisdiction of the subject matter for that purpose, it may decide all the questions involved and grant appropriate relief, even to entering a decree quieting plaintiff's title without proof of his possession. (Colo.) Bessemer etc. Ditch Co. v. Wooley, 91.

2. **LACHES in Seeking Relief from a Mistake of Fact.**—A plaintiff is not chargeable with laches if he moves within a reasonable time after discovering a mistake of fact to seek relief therefrom. (Mass.) Livingstone v. Murphy, 400.

3. **MISTAKE OF FACT, What is.**—A mistake as to the ownership of a lot of land is a mistake of fact. (Mass.) Livingstone v. Murphy, 400.

4. **MISTAKE OF FACT—Relief in Equity.**—An erroneous view of the legal effect of a deed in a chain of title is a mistake of fact against which equity will grant relief. (Mass.) Livingstone v. Murphy, 400.

EQUITY OF REDEMPTION.

See Mortgages, 7, 8.

ESTATES.

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ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

ESTOPPEL.—Persons cannot be Heard to Say that they may at will disregard the mandatory provisions of a statute which they themselves have invoked. (Colo.) McMillen v. Ferrum Mining Co., 64.

Note.
Estoppel of carriers by bills of lading, 347, 348.
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quitclaim deeds, whether create, 857-863.

EVIDENCE.

In General.

1. **EVIDENCE—Photographs—Changed Conditions.—When the situation and surrounding circumstances are subject to change, photographs, to be admissible as evidence, must have been taken at the time of the transaction or when the situation and circumstances are unchanged.** (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

2. **EVIDENCE—Experiments.**—An expert in gunshot wounds who has conducted a series of experiments with pistols of the same caliber as that with which a murder was committed, as well as of the pistol in question, as to the nature and effect of wounds inflicted thereby and of the manner in which they are produced, may be permitted to testify as to the result of such experiments. His testimony is not to be excluded as ex parte and manufactured evidence. (R. I.) State v. Nagle, 864.

3. **EVIDENCE—Corroboration.**—The fact that certain experiments were not necessary in the establishment of a fact sought to be shown by the prosecution does not require their exclusion from evidence, if they tend to corroborate a position taken by an expert witness whose evidence has been received, for whenever the opinion of a person is deemed to be relevant, the grounds on which it is based are also relevant. (R. I.) State v. Nagle, 864.

4. **EVIDENCE Given on Another Trial—Impeachment of Witness.** If it is sought to recover for injury caused by the overturning of a buggy on a highway by a horse attached thereto, after such horse has become frightened by an automobile operated at an excessive rate of speed, evidence of a statement made by the operator of the automobile in another action to recover for injury to the buggy in the same accident, to the effect that he considered himself responsible therefor, is admissible as tending to contradict his evidence given in the personal injury case, that he was not guilty of negligence at the time of the accident. (Ky.) Shinkle v. McCullough, 249.

Presumption of Innocence.

5. **THE PRESUMPTION OF INNOCENCE is not Indulged in a Civil Action,** though it is to recover for the doing of an alleged criminal act. (N. Y.) Kurz v. Doerr, 716.

Books of Account.

6. **EVIDENCE—Books of Account—Form of Keeping.**—A book of accounts to be admissible in evidence, need not be kept in any

particular form; it is enough that it is regularly and correctly kept, containing the original entries of the daily transactions of the business, made at or about the time the transactions were had. (Kan.) State v. Stephenson, 171.

7. **EVIDENCE—Books of Account.—The Name Given a book of** account is not material in determining its admissibility in evidence; the fact that it is called a ledger does not change the character of the entries. (Kan.) State v. Stephenson, 171.

8. **EVIDENCE—Books of Account—Person Making Entries.**—It is not necessary, to make books of account admissible in evidence, that the bookkeeper should have made the sales or billed out the goods sold. (Kan.) State v. Stephenson, 171.

9. **EVIDENCE—Books of Account—Report of Sales.**—If sales are regularly reported to the bookkeeper, and from such reports, or from orders or other temporary memoranda of the salesmen, the entries are promptly and faithfully made by him, the book may be received in evidence when duly verified by him. (Kan.) State v. Stephenson, 171.

Declarations and Admissions.

10. **EVIDENCE—Declarations of Party in Possession When not Admissible.**—A purchaser for value from one apparently vested with the record title is not liable to be confronted with, and to have his title devested by, declarations made by a grantor to the effect that a conveyance of that grantor, which, so far as appears, is in due form and sufficient in all respects to convey the title, is for some reason invalid. (Me.) Phillips v. Laughlin, 253.

11. **AGENCY.—Admissions or Declarations of an Agent bind his** principal only when made during the continuance of the agency in regard to the transaction then pending. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

12. **EVIDENCE—Narrative of Agent.**—A statement made by a street-car conductor to an injured passenger while the latter is being removed from the car, in explanation of the cause of the accident, is not admissible in evidence on the ground that the car conductor was the agent and representative of the railroad company and made the statement by authority to a passenger who had the right to demand the cause of injury. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

Res Gestae.

13. **EVIDENCE, Declarations, When not Part of the Res Gestae.**—Whatever is said by an agent of the carrier, after an accident, relating to the use of a spur track as a delivery track is a statement not made in the performance of a duty and cannot bind his principal as an admission of liability. (Mass.) Bachant v. Boston etc. R. R., 408.

14. **EVIDENCE.—Res Gestae** are those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act, and which in contemplation of law are a part of the act itself. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

15. **EVIDENCE—Res Gestae.**—A statement made by a street-car conductor to an injured passenger at the time the latter is being removed from the car, in explanation as to the cause of the accident, is not admissible in evidence as part of the res gestae. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

Expert Testimony.

16. **EXPERT EVIDENCE—Cause of Injury.**—An expert medical witness is competent to give his opinion upon a hypothetical question based upon the facts in evidence, that an injury was the cause of a disease or condition found in the injured person. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

17. **EVIDENCE, EXPERT, When not Admissible.**—The evidence of experts is not admissible to show the usage and object of underwriters in inserting the pro rata clause in policies of reinsurance, where the object of the evidence is to contradict the plain language in the policy after its meaning has been settled by the construction of the courts. (N. Y.) Home Insurance Co. v. Continental Ins. Co., 772.

See Criminal Law, 6-14; Witnesses.

Note.

Evidence, bills of lading, parol to vary or contradict, 335.
guaranty, extrinsic to aid contracts of, 521.
of other crimes. See Criminal Prosecutions.

EXCAVATIONS.

See Adjoining Owners.

EXECUTIONS.

Return.

1. **EXECUTIONS—Sufficiency of Return.**—If a constable's return of an execution complies with the spirit of the statute, and is substantially in the form prescribed by it, it is sufficient. Hence such return reciting "no other property found on which to levy this writ" is a sufficient return of nulla bona. (Mo.) Ables v. Webb, 610.

2. **EXECUTIONS—Collateral Attack.**—A constable's return of an execution, premature by one day, cannot be collaterally attacked, where the interests of third parties only are involved. (Mo.) Ables v. Webb, 610.

Sale.

3. **AN EXECUTION SALE to a Wife Under a Judgment Against Her Husband** and a conveyance made pursuant thereto are void. (Mass.) Livingstone v. Murphy, 400.

4. **EXECUTION SALES—Collateral Attack.**—Title to land under a sale, on an execution issued by a circuit clerk on a justice's transcript, cannot be collaterally attacked on the ground that the precedent execution issued by the justice was directed to the wrong constable. (Mo.) Ables v. Webb, 610.

5. **AN EXECUTION SALE is not Subject to Equities** of which the attaching or judgment creditors had no notice. (Mass.) Livingstone v. Murphy, 400.

EXECUTORS AND ADMINISTRATORS.

Appointment and Competency.

1. **EXECUTOR Named in Will must be Appointed by Court.**—The word "shall," in a statute declaring that the probate court shall issue letters testamentary to the executor named in a will if he is legally competent, is used in an imperative sense. (Ill.) Clark v. Patterson, 127.

2. **EXECUTOR—Competency—Moral Delinquencies.**—If the woman named by a testator as executrix of his will is legally competent, the court cannot refuse to grant her letters testamentary on the ground that she had held illicit sexual relations with the testator. (Ill.) Clark v. Patterson, 127.

3. **EXECUTOR—Competency—Adverse Interest.**—If the woman named by a testator in his will as executrix is legally competent, the court cannot refuse to grant her letters testamentary on the ground that she had sustained intimate relations with testator and had received property from him during the continuance of such relations. (Ill.) Clark v. Patterson, 127.

4. **EXECUTOR—Competency—Adverse Interest and Want of Harmony.**—If the statutes, in enumerating the causes rendering an executor disqualified, do not mention an adverse interest of a creditor of the testator or a want of harmony with the heirs and coexecutors as disqualifications, the court will not refuse letters testamentary for those causes. (Ill.) Clark v. Patterson, 127.

5. **EXECUTOR—Competency—Subsequent Disabilities.**—A court, when asked to appoint the person whom a testator has nominated as executor, cannot refuse to make the appointment on the ground that reasons are alleged which warrant the belief that the executor will subsequently incur disabilities specified, or will so conduct himself that grounds for revocation of the letters will arise in the future. (Ill.) Clark v. Patterson, 127.

Revocation of Letters.

6. **EXECUTOR—Revocation of Letters.**—It is only when one or more of the statutory causes for revocation are properly brought before the court for judicial action thereon that it has jurisdiction to revoke letters of administration or letters testamentary. (Ill.) Clark v. Patterson, 127.

Coexecutors.

7. **ONE EXECUTOR IS NOT LIABLE as Such for Waste Committed by a Coexecutor,** nor for assets which the latter received and misapplied without the knowledge or consent of the former. (R. I.) Municipal Court v. Whaley, 890.

8. **EXECUTORS AND COEXECUTORS.**—One executor, on an accounting, is not held by the acts of another in which he has not participated and as to which he has not been negligent. (R. I.) Municipal Court v. Whaley, 890.

9. **ONE EXECUTOR MAY SUE ANOTHER and Their Sureties** where both executors have given a joint and several bond with the same sureties and, as to the executor sued, there has been a breach of the condition of the bond and the executor suing is a legatee and as such beneficially interested in the recovery. It is no objection that he is thus permitted to sue his own sureties. (R. I.) Municipal Court v. Whaley, 890.

Real Estate and Its Sale.

10. **ESTATES OF DECEDENTS.—Land** on the death of an intestate descends directly to his heirs, and is no part of the estate which goes into the hands of the administrator for distribution, except when necessary to sell it to pay decedent's debts. (Mo.) Stark v. Kirchgraber, 629.

11. **ESTATES OF DECEDENTS—Sale of Land.**—A statute providing that a person interested in the estate of a deceased person

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4. **EVIDENCE Given on Another Trial—Impeachment of Witness.** f it is sought to recover for injury caused by the overturning of a uggy on a highway by a horse attached thereto, after such horse as become frightened by an automobile operated at an excessive ate of speed, evidence of a statement made by the operator of the utomobile in another action to recover for injury to the buggy in he same accident, to the effect that he considered himself responsile therefor, is admissible as tending to contradict his evidence given n the personal injury case, that he was not guilty of negligence at he time of the accident. (Ky.) Shinkle v. McCullough, 249.

Presumption of Innocence.

5. **THE PRESUMPTION OF INNOCENCE is not Indulged in a Civil Action,** though it is to recover for the doing of an alleged riminal act. (N. Y.) Kurz v. Doerr, 716.

Books of Account.

6. **EVIDENCE—Books of Account—Form of Keeping.**—A book f accounts to be admissible in evidence, need not be kept in any

particular form; it is enough that it is regularly and correctly kept, containing the original entries of the daily transactions of the business, made at or about the time the transactions were had. (Kan.) State v. Stephenson, 171.

7. **EVIDENCE—Books of Account.—The Name Given** a book of account is not material in determining its admissibility in evidence; the fact that it is called a ledger does not change the character of the entries. (Kan.) State v. Stephenson, 171.

8. **EVIDENCE—Books of Account—Person Making Entries.**—It is not necessary, to make books of account admissible in evidence, that the bookkeeper should have made the sales or billed out the goods sold. (Kan.) State v. Stephenson, 171.

9. **EVIDENCE—Books of Account—Report of Sales.**—If sales are regularly reported to the bookkeeper, and from such reports, or from orders or other temporary memoranda of the salesmen, the entries are promptly and faithfully made by him, the book may be received in evidence when duly verified by him. (Kan.) State v. Stephenson, 171.

Declarations and Admissions.

10. **EVIDENCE—Declarations of Party in Possession When not Admissible.**—A purchaser for value from one apparently vested with the record title is not liable to be confronted with, and to have his title devested by, declarations made by a grantor to the effect that a conveyance of that grantor, which, so far as appears, is in due form and sufficient in all respects to convey the title, is for some reason invalid. (Me.) Phillips v. Laughlin, 253.

11. **AGENCY.—Admissions or Declarations of an Agent** bind his principal only when made during the continuance of the agency in regard to the transaction then pending. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

12. **EVIDENCE—Narrative of Agent.**—A statement made by a street-car conductor to an injured passenger while the latter is being removed from the car, in explanation of the cause of the accident, is not admissible in evidence on the ground that the car conductor was the agent and representative of the railroad company and made the statement by authority to a passenger who had the right to demand the cause of injury. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

Res Gestae.

13. **EVIDENCE, Declarations, When not Part of the Res Gestae.**—Whatever is said by an agent of the carrier, after an accident, relating to the use of a spur track as a delivery track is a statement not made in the performance of a duty and cannot bind his principal as an admission of liability. (Mass.) Bachant v. Boston etc. R. R., 408.

14. **EVIDENCE.—Res Gestae** are those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act, and which in contemplation of law are a part of the act itself. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

15. **EVIDENCE—Res Gestae.**—A statement made by a street-car conductor to an injured passenger at the time the latter is being removed from the car, in explanation as to the cause of the accident, is not admissible in evidence as part of the res gestae. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

Expert Testimony.

16. **EXPERT EVIDENCE—Cause of Injury.**—An expert medical witness is competent to give his opinion upon a hypothetical question based upon the facts in evidence, that an injury was the cause of a disease or condition found in the injured person. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

17. **EVIDENCE, EXPERT, When not Admissible.**—The evidence of experts is not admissible to show the usage and object of underwriters in inserting the pro rata clause in policies of reinsurance, where the object of the evidence is to contradict the plain language in the policy after its meaning has been settled by the construction of the courts. (N. Y.) Home Insurance Co. v. Continental Ins. Co., 772.

See Criminal Law, 6-14; Witnesses.

Note.

Evidence, bills of lading, parol to vary or contradict, 335.
guaranty, extrinsic to aid contracts of, 521.
of other crimes. See Criminal Prosecutions.

EXCAVATIONS.

See Adjoining Owners.

EXECUTIONS.

Return.

1. **EXECUTIONS—Sufficiency of Return.**—If a constable's return of an execution complies with the spirit of the statute, and is substantially in the form prescribed by it, it is sufficient. Hence such return reciting "no other property found on which to levy this writ" is a sufficient return of nulla bona. (Mo.) Ables v. Webb, 610.

2. **EXECUTIONS—Collateral Attack.**—A constable's return of an execution, premature by one day, cannot be collaterally attacked, where the interests of third parties only are involved. (Mo.) Ables v. Webb, 610.

Sale.

3. **AN EXECUTION SALE to a Wife Under a Judgment Against Her Husband** and a conveyance made pursuant thereto are void. (Mass.) Livingstone v. Murphy, 400.

4. **EXECUTION SALES—Collateral Attack.**—Title to land under a sale, on an execution issued by a circuit clerk on a justice's transcript, cannot be collaterally attacked on the ground that the precedent execution issued by the justice was directed to the wrong constable. (Mo.) Ables v. Webb, 610.

5. **AN EXECUTION SALE is not Subject to Equities of which** the attaching or judgment creditors had no notice. (Mass.) Livingstone v. Murphy, 400.

EXECUTORS AND ADMINISTRATORS.

Appointment and Competency.

1. **EXECUTOR Named in Will must be Appointed by Court.**—The word "shall," in a statute declaring that the probate court shall issue letters testamentary to the executor named in a will if he is legally competent, is used in an imperative sense. (Ill.) Clark v. Patterson, 127.

2. **EXECUTOR—Competency—Moral Delinquencies.**—If the woman named by a testator as executrix of his will is legally competent, the court cannot refuse to grant her letters testamentary on the ground that she had held illicit sexual relations with the testator. (Ill.) Clark v. Patterson, 127.

3. **EXECUTOR—Competency—Adverse Interest.**—If the woman named by a testator in his will as executrix is legally competent, the court cannot refuse to grant her letters testamentary on the ground that she had sustained intimate relations with testator and had received property from him during the continuance of such relations. (Ill.) Clark v. Patterson, 127.

4. **EXECUTOR—Competency—Adverse Interest and Want of Harmony.**—If the statutes, in enumerating the causes rendering an executor disqualified, do not mention an adverse interest of a creditor of the testator or a want of harmony with the heirs and coexecutors as disqualifications, the court will not refuse letters testamentary for those causes. (Ill.) Clark v. Patterson, 127.

5. **EXECUTOR—Competency—Subsequent Disabilities.**—A court, when asked to appoint the person whom a testator has nominated as executor, cannot refuse to make the appointment on the ground that reasons are alleged which warrant the belief that the executor will subsequently incur disabilities specified, or will so conduct himself that grounds for revocation of the letters will arise in the future. (Ill.) Clark v. Patterson, 127.

Revocation of Letters.

6. **EXECUTOR—Revocation of Letters.**—It is only when one or more of the statutory causes for revocation are properly brought before the court for judicial action thereon that it has jurisdiction to revoke letters of administration or letters testamentary. (Ill.) Clark v. Patterson, 127.

Coexecutors.

7. **ONE EXECUTOR IS NOT LIABLE as Such for Waste Committed by a Coexecutor,** nor for assets which the latter received and misapplied without the knowledge or consent of the former. (R. I.) Municipal Court v. Whaley, 890.

8. **EXECUTORS AND COEXECUTORS.**—One executor, on an accounting, is not held by the acts of another in which he has not participated and as to which he has not been negligent. (R. I.) Municipal Court v. Whaley, 890.

9. **ONE EXECUTOR MAY SUE ANOTHER and Their Sureties** where both executors have given a joint and several bond with the same sureties and, as to the executor sued, there has been a breach of the condition of the bond and the executor suing is a legatee and as such beneficially interested in the recovery. It is no objection that he is thus permitted to sue his own sureties. (R. I.) Municipal Court v. Whaley, 890.

Real Estate and Its Sale.

10. **ESTATES OF DECEDENTS.—Land** on the death of an intestate descends directly to his heirs, and is no part of the estate which goes into the hands of the administrator for distribution, except when necessary to sell it to pay decedent's debts. (Mo.) Stark v. Kirchgraber, 629.

11. **ESTATES OF DECEDENTS—Sale of Land.**—A statute providing that a person interested in the estate of a deceased person

may apply for the sale of the real estate of the decedent applies only to such persons as are entitled to a distributive share in such estate. Hence one who has bought the interest of an heir in such estate has no right to make such application and a sale thereon is void. (Mo.) Stark v. Kirchgraber, 629.

12. **ESTATES OF DECEDENTS—Sale of Land—Collateral Attack.**—Although a judgment of a probate court ordering the sale of real estate cannot be collaterally attacked if the court had jurisdiction, yet the whole record may be introduced to show that the court had no jurisdiction to entertain the application for the sale or to make the order therefor, and that, for that reason, its judgment was void. (Mo.) Stark v. Kirchgraber, 629.

13. **ESTATES OF DECEDENTS—Sale of Real Estate—Jurisdiction.**—An order of court to sell the real estate of a decedent made on the application of one who has no interest in such estate is without jurisdiction and void. (Mo.) Stark v. Kirchgraber, 629.

Notes and Mortgages.

14. **ADMINISTRATORS, Personal Liability of on Notes and Mortgages.**—A promissory note reading, "I., O. H. P., administrator of the estate of Sherburn Bryant, deceased, acting under an order of the county court, promise to pay" a sum specified, and a mortgage showing on its face that it is given to secure the payment of such note, create no personal liability against the adminstrator. (Wis.) Wisconsin Trust Co. v. Chapman, 1032.

15. **ADMINISTRATOR.—A Purchaser of a Promissory Note** which on its face shows that it is executed by the promisor as administrator and under an order of court is chargeable with knowledge of the purpose for, and the authority under, which it is executed, and has no right to rely on the personal liability of such administrator. (Wis.) Wisconsin Trust Co. v. Chapman, 1032.

16. **ESTOPPEL to Resist Foreclosure of Mortgage Made by an Administrator.**—An heir who appears in proceedings in court to authorize the execution of a mortgage by an administrator and also in the settlement of his accounts, and thereafter accepts a partition of the estate which gives him property subject to such mortgage, is estopped from raising the question of the irregularity of the proceedings of the court by which the mortgage was authorized. (Wis.) Wisconsin Trust Co. v. Chapman, 1032.

17. **NOTES AND MORTGAGES by Administrator, Construction of.** A transfer of real estate by an administrator under the power and direction of the court must be viewed in the light of his relation to the property and the objects to be accomplished, and the words of transfer must be given an interpretation limited to the occasion. (Wis.) Wisconsin Trust Co. v. Chapman, 1032.

Costs of Suit.

18. **ADMINISTRATOR, When Entitled to Costs of Suit.**—If an action is commenced to foreclose a mortgage and obtain a personal judgment against one who executed it as administrator, he, because he has a good defense to the claim that he is personally liable, is entitled to be awarded his costs. (Wis.) Wisconsin Trust Co. v. Chapman, 1032.

See Partnership, 1-3.

EXPERIMENTS.

See Evidence, 2.

EXPERT TESTIMONY.

See Evidence, 16, 17.

FIDELITY INSURANCE.

See Insurance, 25.

FIREMEN.

See Municipal Corporations, 8, 9.

FIREWORKS.

See Municipal Corporations, 3; Nuisance.

FIXTURES.

1. **FIXTURES—What are.—When Chattels have been placed in** and annexed to a building by their owner as a part of the means by which to carry out the purposes for which it was erected, or to which it has been adapted, with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, fixtures, and as much a part of the realty as the building itself, notwithstanding they may be removed from the building without injury to them or it and advantageously used elsewhere, and notwithstanding the building may readily be devoted thereafter to a use entirely different from that contemplated when the annexation was made. (N. J. Eq.) Knickerbocker Trust Co. v. Penn Cordage Co., 640.

2. **FIXTURES, Agreements, When may Control Question of.**—As between themselves, landlord and tenant and vendor and vendee may say whether a thing shall be regarded as a fixture or not, but such an agreement cannot bind other parties having rights in the property. (R. I.) McCrillis v. Cole, 875.

3. **FIXTURES.—The Rule as to What are Fixtures is Substantially the Same Between Mortgagor and Mortgagee as** between vendor and vendee. (R. I.) McCrillis v. Cole, 875.

4. **FIXTURES.—The Relation Between Parties Should be Deemed the Same as if They were Mortgagor and Mortgagee,** when one has agreed to build a mill on land and to sell the land and mill to the other, and the latter has on his part agreed to supply certain machinery to be placed in and become a part of such mill, and the question arises between them whether such machinery shall be regarded as an irrevocable fixture. (R. I.) McCrillis v. Cole, 875.

5. **FIXTURES, What are.**—Whatever is attached to the realty with a view of enhancing its value and for the purpose of being permanently used in connection with it is a fixture, and the fact that it can be removed without physical injury to the freehold does not change its character. (R. I.) McCrillis v. Cole, 875.

6. **FIXTURES, Seller of by Conditional Sale, When may not Reclaim.**—One who sells machinery to be put in a mill, with a stipulation that such machinery shall remain his until paid for, cannot, after permitting it to be made a part of such mill, without any inquiry as to ownership, remove it as against one whose rights are substantially those of a mortgagee of the mill. (R. I.) McCrillis v. Cole, 875.

7. **FIXTURES.—With Respect to What are Fixtures as Between Mortgagee and a Third Person Who Permitted Them to be Annexed to the Freehold** as the result of a conditional sale by him to the mortgagor, it is not material whether the mortgage was executed before or after the annexation. (R. I.) McCrillis v. Cole, 875.

Note.

Fixtures, tests for determining what are, 646.

Forgery, other crimes, evidence of, in prosecutions for, 995, 996, 1000, 1003.

FRANCHISES.

1. **THE GENERAL FRANCHISE of a Corporation is its right to live** and do business by the exercise of the corporate powers granted by the state. (N. Y.) People v. State Bd. of Tax Commrs., 674.

2. **SPECIAL FRANCHISE, What is.—When a Right of Way Over a Public Street is Granted to a Railway Company, with leave to construct** and operate a street railway thereon, the privilege is known as a special franchise. (N. Y.) People v. State Bd. of Tax Commrs., 674.

See Taxation, 3-6.

Note.

Franchises, taxation of, is constitutional, 701-709.

FRAUD.

1. **FRAUD must be Established** by the person alleging it by a preponderance of clear and satisfactory evidence. (Wis.) Standard Mfg. Co. v. Slot, 1016.

2. **FRAUD and Inattention, Contract Due to Combined Effect of.** Where there is fraud on one side and inattention to reasonably guard his interests on the other, and but for the latter feature the former would have been ineffective, and loss occurs to the inexcusably negligent one, he is without remedy. (Wis.) Standard Mfg. Co. v. Slot, 1016.

3. **FALSE REPRESENTATIONS, Immateriality of Intent.**—Where it appears that the signing of a contract was induced by false representations of an agent of one of the contracting parties, evidence to prove his innocence of any bad intent is not admissible. (Wis.) Standard Mfg. Co. v. Slot, 1016.

4. **CONTRACTS—False Representations.—If a Person Either Knowingly or Ignorantly Makes a False Statement of Fact** in a business transaction, reasonably calculated to deceive another and induce him to do that which he would not do with knowledge of the truth, and it has that effect, the act of such other is attributable to fraud, and is not binding on him, unless he subsequently ratifies with knowledge of the facts, or in some other way precludes himself from rescinding it. (Wis.) Standard Mfg. Co. v. Slot, 1016.

5. **EVIDENCE of Other Transaction with Other Persons** is not admissible to prove guilty intent in making certain false representations, if it is immaterial to the cause of action, whether such representations were made with a specific bad intent or not. (Wis.) Standard Mfg. Co. v. Slot, 1016.

FRAUDS, STATUTE OF.

In General—Pleading.

1. **STATUTE OF FRAUDS, Contract, When Within.**—A contract made in the latter part of March, 1900, to purchase for the term of one year, commencing on the first day of April of the same year, the milk to be produced on a specified farm, at a price designated, is within the statute of frauds. (N. Y.) Seamens v. Barentsen, 759.

2. **STATUTE OF FRAUDS, Waiver of.**—Where the statute of frauds is not pleaded and does not appear to have been relied on at the trial, it must be regarded as having been waived. (Mass.) Livingstone v. Murphy, 400.

3. **STATUTE OF FRAUDS, Plea of may be Answered Though It Might also have been by Demurrer.**—The failure to plead the statute of frauds by demurrer when the invalidity of a contract appears on the face of a complaint is not a waiver, and defendant may still interpose such plea by his answer, where the code provides that an objection taken neither by demurrer nor answer is deemed to have been waived, except an objection that the complaint does not state facts sufficient to constitute a cause of action. (N. Y.) Seamans v. Barentsen, 759.

Sale of Land.

4. **STATUTE OF FRAUDS—Description of Real Estate.**—A receipt for a part of the purchase money of a well-known city hotel property, which specifically designates the hotel by name, is a sufficient memorandum to satisfy the statute of frauds. (Pa. St.) Henry v. Black, 802.

5. **STATUTE OF FRAUDS—Sale of Realty—Written Authority of Corporate Officer.**—An officer of a corporation, the business of which is dealing in real estate and taking options, authorized to take an option in his own name, may, without written authority, sell the property to a purchaser. (Pa. St.) Henry v. Black, 802.

6. **STATUTE OF FRAUDS.—The Signing of a Contract for the Sale and Purchase of Real Property by the Seller Only satisfies the** statute of frauds, if the contract is accepted by the purchaser, and it cannot be avoided by the vendor for want of mutuality. (Ark.) Vance v. Newman, 42.

Agreement to Devise Lands.

7. **STATUTE OF FRAUDS—Part Performance.**—A parol agreement to convey or devise lands is unenforceable at law, and also in equity, unless there has been a partial or full performance in certain respects, in which case it may be specifically enforced. (N. J. Eq.) Cooper v. Colson, 660.

8. **STATUTE OF FRAUDS—Contract to Devise Land in Return for Services.**—The performance of services which are neither exceptional nor extraordinary, and which can be compensated upon a quantum meruit, does not take an oral agreement to devise a farm in consideration of such services out of the statute of frauds. (N. J. Eq.) Cooper v. Colson, 660.

Part Performance.

9. **STATUTE OF FRAUDS.—Payment of a Part,** or even of the whole, of the purchase money, is not an act of part performance to take a contract for the conveyance of land out of the statute of frauds. (N. J. Eq.) Cooper v. Colson, 660.

10. **STATUTE OF FRAUDS—Part Performance.**—To take a contract out of the statute of frauds on the ground of part performance, the terms of the contract must be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. (N. J. Eq.) Cooper v. Colson, 660.

Recovery of Money Paid under Oral Contract.

11. **STATUTE OF FRAUDS—Recovery of Money Paid Under Oral Contract.**—A vendee can recover from the vendor, for a breach of a parol contract to convey land, so much of the purchase money as has been paid. (Pa. St.) Durham v. Wick, 789.

12. **STATUTE OF FRAUDS—Recovery of Money Paid Under Oral Contract.**—The refusal of a vendor in a parol contract for the sale of land to execute a conveyance relieves the vendee from the necessity of tendering full payment as a condition precedent to recovering the amount of purchase money already paid. (Pa. St.) Durham v. Wick, 789.

13. **STATUTE OF FRAUDS—Recovery of Money Paid Under Oral Contract.**—A trustee in bankruptcy may, without tendering the full amount of the purchase price, recover the amount already paid by the bankrupt under a parol contract for the purchase of land, if the vendor refuses to convey to the bankrupt, and, prior to the trial, leases the property to a third person. (Pa. St.) Durham v. Wick, 789.

Note.

Frauds, Statute of, action to recover money paid under contract void by, form of, 796.
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timber, sale of, whether within, 796.

GAMING.

Gambling Generally.

1. **GAMBLING, What is.**—It is not essential to gambling, under the statutes of Maine, that both parties shall stand to lose by the chance. It is enough that one of them stands to lose or win by chance. (Me.) Lang v. Merwin, 293.

2. **GAMBLING—Nickel-in-the-Slot Machines.**—A slot machine into which a customer drops a nickel, and thereupon receives, in any event, a five cent cigar, and may receive an additional number without further payment, is a gambling device. (Me.) Lang v. Merwin, 293.

Gambling Notes.

3. **GAMBLING—Note Enforceable by Bona Fide Holder.**—A statute declaring that notes the consideration of which is money won at gambling are void though assigned does not render unenforceable, by a bona fide holder, a note that was given to take up checks, which had been drawn by the maker of the note to obtain money to

continue in a poker game with the payee and others. (Mo.) Higginbotham v. McGready, 461.

4. GAMBLING—Notes—Constitutional Law.—Where one section of a statute declares that notes the consideration whereof is money won at gambling are void, another section declaring that the assignment of such notes shall not affect the defense of the makers is not unconstitutional as abridging any right of private contract. (Mo.) Higginbotham v. McGready, 461.

GOODWILL.

See Partnership.

GUARANTY.

GUARANTY—Acceptance and Notice Thereof.—Acceptance of an offer of guaranty, and notice of the acceptance, are necessary to complete the contract; yet they may be inferred if the circumstances justify the inference, or they may be waived if a purpose to do so appears in the terms of the offer itself or in the conduct of the parties. (Mo.) Pearsell Mfg. Co. v. Jeffreys, 496.

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HIGHWAYS.

Automobiles.

1. **AUTOMOBILES—Care Required in Management of.**—If one operating an automobile upon a highway knows, or in the exercise of ordinary care should know, that the machine has so far excited and frightened a horse, as to render it dangerous and unmanageable, it is the duty of such person to stop the automobile and take such other steps for the safety of the driver of the horse as ordinary prudence may suggest. Otherwise, the driver of the machine is guilty of negligence. (Ky.) Shinkle v. McCullough, 249.

2. **AUTOMOBILES are Lawful Means of Conveyance,** and have equal rights upon the public roads with horses and carriages, but their use must be accompanied with that degree of prudence and management, and consideration for the rights of others, which is consistent with their safety. (Ky.) Shinkle v. McCullough, 249.

3. **AUTOMOBILES—Excessive Speed — Negligence—Frightening Horses.**—If a person, while operating an automobile on a highway at an excessive rate of speed and with much noise, thereby frightens a horse attached to a buggy, whereby the buggy is overturned and the occupant thereof injured, the operator of the automobile is guilty of negligence and liable for the injury. (Ky.) Shinkle v. McCullough, 249.

Runaway Horses.

4. **HIGHWAYS—Horse, When More than "Momentarily Uncontrollable."**—A horse which, when driven along a public highway, becomes frightened and runs eighty or ninety feet, resisting the driver's efforts to stop his forward movement, cannot be said to be only "momentarily uncontrollable" in the sense in which that expression is used in the law on the subject of the liability of municipalities for defects in highways. (Wis.) Ehleiter v. Milwaukee, 1027.

Obstructions.

5. **HIGHWAYS, Action by Private Persons for Obstruction of.**—To entitle a private person to maintain an action for damages resulting from the obstruction of a public highway, or a suit in equity to

prevent such obstruction, he must have sustained damages differing not merely in degree, but in kind, from the damages sustained by the general public. (Wis.) Tilly v. Mitchell etc. Co., 1007.

6. **HIGHWAYS—Obstruction—Injury Which will Sustain Suit by Private Person.**—Where it is proposed to vacate or obstruct a public street, property owners whose lots abut thereon, but not on the block where it is proposed to be vacated or obstructed, which lots will be greatly depreciated in value by the proposed action, sustain a sufficient special or pecuniary injury to entitle them to maintain a suit to have declared void a municipal ordinance authorizing such obstruction or vacation. (Wis.) Tilly v. Mitchell etc. Co., 1007.

See Municipal Corporations, 10-26.

HOLOGRAPH.

See Wills, 14.

HOMESTEAD.

HOMESTEAD.—A Conveyance of a Homestead by a Husband to His Wife need not be joined in nor executed by her. (Ark.) Kindley v. Spraker, 32.

HOMICIDE.

CONSTITUTIONAL LAW—Statute Declaring Attempt to Produce Abortion to be Manslaughter.—A statute which declares any person guilty of second degree manslaughter who administers to any pregnant woman any medicine or drug, or uses any instrument or other means to destroy the foetus or child of such woman, unless necessary to preserve her life, is void as an attempt to create a felonious homicide, where neither the death of the woman nor of the child is the necessary result of the act or acts committed, and where there is no killing. (Mo.) State v. Hartley, 608.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—Conveyance Directly to Wife.**—A conveyance of land by a husband directly to his wife vests the equitable title in her while the legal title remains in him as trustee for her, but upon her death the trusteeship ceases and the whole title vests in her heirs, depriving the husband of the right thereafter to convey any title to the land. (Mo.) Stark v. Kirchgraber, 629.

2. **HUSBAND AND WIFE—Conveyances to—Estate by Entirety.** A deed conveying an undivided half interest in land to husband and wife respectively does not create a tenancy in common, but an estate of entirety, and upon the death of the wife, the whole estate goes to the husband surviving and his conveyance of his interest carries the whole estate. (Mo.) Wilson v. Frost, 619.

3. **HUSBAND AND WIFE—Conveyances to.**—Although husband and wife may take an estate of tenancy in common under the same deed, the intention to create such an estate must be clearly shown by unequivocal words in the deed. (Mo.) Wilson v. Frost, 619.

See Adverse Possession; Homesteads; Larceny; Reformation of Instruments.

Note.

Indemnity, difference between and guaranty, 506.

INDETERMINATE SENTENCE.

See Criminal Law, 14.

INDICTMENT AND INFORMATION.

In General.

1. **AN INDICTMENT in the Language of the Statute is not Sufficient,** if such statute fails to set out the facts constituting the offense sufficiently to apprise the defendant of the cause or precise nature of the charge against him. (Me.) State v. Doran, 278.

2. **INDICTMENT, When Must Set Out the Facts.**—Where a mere generic term is used, or where the words of a statute in their generality may embrace cases which fall within the terms, but not within the spirit or meaning thereof, the specific facts must be alleged to bring it within the inhibitions of the law. (Me.) State v. Doran, 278.

3. **CRIMINAL LAW—Information—Signing.**—The fact that an information is signed by the initial of the prosecuting attorney's first name, instead of by his first name in full, is a substantial compliance with the statute requiring the information to be signed by the prosecuting attorney. (Mo.) State v. Brock, 625.

4. **CRIMINAL TRIALS—Affidavits—Evidence.**—Whether an affidavit to support an information states the facts required by statute must be determined by the affidavit itself. Its statements cannot be attacked by extraneous evidence, nor upon the ground that the testimony may disclose that the person who verified it did not have the knowledge relative to the offense charged which the statute requires. (Colo.) Overland Cotton Mill Co. v. People, 74.

For Attempt to Commit Crime.

5. **INDICTMENT for Attempting to Commit a Crime, When Insufficient.**—An indictment charging that the defendant feloniously, willfully and maliciously did attempt to break and enter a car for the purpose of committing a felony is insufficient, because it neither specifies the particular felony attempted to be committed, nor otherwise apprises the defendant of the specific offense which it is claimed he intended to commit. (Me.) State v. Doran, 278.

6. **AN INDICTMENT for an Attempt to Commit a Crime Must Specify** the particular felony intended, but it need not be set out as fully and specifically as would be required in an indictment for the actual commission of such felony. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal or commit the crime of larceny, rape or arson, etc. (Me.) State v. Doran, 278.

See Burglary.

Note.

Indorsement, difference between and guaranty, 507.

INFANTS.

1. **INFANCY—Contracts—Misrepresentation — Estoppel.**—A willful misrepresentation by an infant that he is an adult, by which money of another is had on a mortgage, and which deceives the lender, is a bar to an avoidance of the mortgage, on the solicitation in equity of the borrower, especially when the fruits of the fraud are not tendered back, and are expended for necessaries. (Miss.) Ostrander v. Quin, 426.

2. **SEDUCTION BY MINOR.**—A minor capable of seducing and debauching a female may be guilty of seduction under promise of marriage. (Mo.) State v. Brock, 625.

See Parent and Child; Railroads, 18, 19.

INFORMATION.

See Indictment and Information.

INJUNCTIONS.

INJUNCTION Against Trespass on Railroad Track.—An injunction will issue against one who makes a practice of riding a bicycle on a railway track, and thereby menaces the safety of public travel. (Kan.) Atchison, Topeka etc. Ry. Co. v. Spaulding, 175.

See Municipal Corporations, 11, 19.

Note.

Injunction against public officers, effect of, 217.

INNKEEPERS.

1. **INNKEEPERS—Guest—Who is.**—One cannot become the guest of a hotel unless he secures some accommodation therein. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper, before he becomes a guest. (Tenn.) Tulane Hotel Co. v. Holohan, 930.

2. **INNKEEPERS—Liability for Goods of One not a Guest.**—An innkeeper to whom one not a guest sends goods to be held without consideration or compensation is not liable as an innkeeper, but simply as a gratuitous bailee, if the goods are lost or damaged. (Tenn.) Tulane Hotel Co. v. Holohan, 930.

3. **INNKEEPERS—Liability for Goods of One not a Guest.**—If a person at a depot turns his grips over to the porter of a hotel, intending to become a guest therein, but changes his mind and does not go there, nor procure any accommodation therein, he does not become a guest at the hotel, nor can he charge the hotel-keeper with any liability for the loss of his grips, either as an innkeeper or as a gratuitous bailee. (Tenn.) Tulane Hotel Co. v. Holohan, 930.

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purchase of liquor at an inn, whether makes the purchaser a guest, 933.
relation of innkeeper and guest, when established, 932.

INSURANCE.

Statutory Regulation.

1. **CONSTITUTIONAL LAW—Insurance—Penalties.**—A statute imposing a penalty upon insurance companies refusing in bad faith to pay policies, and on the insured for bringing suit in bad faith on policies, is valid and not unconstitutional as class legislation. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

2. **CONSTITUTIONAL LAW—Insurance.**—A statute providing that no misrepresentation or warranty, unless made with actual intent to deceive, or unless the risk or loss is thereby increased, shall defeat or avoid an insurance policy, is not unconstitutional as class legislation, and is a valid exercise of the police power, although it applies only to nonassessment insurance companies. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

Fire Insurance Generally.

3. **INSURANCE—Want of Insurable Interest.**—If the insured has not an insurable interest in the property, the policy is void from the beginning. (R. I.) Smith v. Union Ins. Co., 882.

4. **INSURANCE—Severability—Vacancy of Premises.**—Where a single premium is paid for a policy against fire and wind, the insurance is distributed in specific amounts over a house, hay and grain, and a corn-crib, and there is a condition against the premises becoming vacant, there can be no recovery on the policy for a destruction of the corn-crib by a windstorm after the tenant of the land who occupied the house has moved away. (Kan.) Republic County Mutual Fire Ins. Co. v. Johnson, 157.

5. **INSURANCE—Severability.**—Although a policy placing separate valuations upon separate subjects of insurance is ordinarily severable, it is not so unless the risk intended to be excluded by a violated condition does not affect the item of property for the destruction of which a recovery is sought. (Kan.) Republic County Mutual Fire Ins. Co. v. Johnson, 157.

6. **INSURANCE.—A Condition that a Policy Shall be Void if, Without the Consent in Writing of the Insurer,** the property shall be sold, is valid, but to avoid the policy the sale must be such as passes title to the property insured. (Me.) International Wood Co. v. National Assur. Co., 288.

7. **INSURANCE—Condition Against Sale of Property—Effect of Judicial Sale not Completed by Payment.**—A condition in a policy of insurance declaring that it shall be void, if, without consent in

writing or printing, the property shall be sold, is not violated by a judicial sale of the property and its confirmation, if payment of the purchase price is not made and no bill of sale is executed. (Me.) International Wood Co. v. National Assur. Co., 288.

8, 9. **INSURANCE—Fire-Proof Safe Clause—Failure to Observe Warranty.**—A warranty in a fire insurance policy that the insured will keep his books of accounts and inventories securely locked in a fire-proof safe at night, and when the building is not actually open for business, or in some place not exposed to fire which would destroy the building insured, is directly within the terms of a statute providing that no misrepresentation or warranty, unless made with actual intent to deceive, or, unless the risk or loss is thereby increased, shall defeat or avoid an insurance policy. Hence, failure to observe the warranty contained in the fire-proof safe clause does not necessarily avoid the policy. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

Misrepresentation—Encumbrances.

See ante, 2.

10. **INSURANCE—Misrepresentations—Evidence.**—If the applicant for insurance makes correct statements to the insurance agent, who puts them down incorrectly, and the application is signed by the insured without reading it, he may prove such facts, and is then exonerated from the charge of misrepresentation. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

11. **INSURANCE—Encumbrances—Misrepresentations.**—If the insured makes no statements as to encumbrances, and signs the application for insurance without reading it when such application is written by the insurance agent, the insured is not guilty of misrepresentation, although the application falsely states that there is no encumbrance upon the insured property. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

12. **INSURANCE.—Misrepresentation as to Encumbrances** will not, under the statute of Tennessee, avoid an insurance policy, since an encumbrance does not increase the risk. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

Mortgagor and Mortgagee.

13. **INSURANCE.—The Right of a Mortgagee to Recover on a Policy of Insurance in Favor of His Mortgagor** is dependent upon the inception and continuance of a valid contract of insurance between the insured and the insurer. (R. I.) Smith v. Union Ins. Co., 882.

14. **INSURANCE in Favor of Mortgagee, Construction of Mortgage Clause—Want of Insurable Interest in the Mortgagor.**—A policy of insurance providing that the loss, if any, shall be payable to S. as mortgagee as interest may appear, and that the insurance as to the interest of such mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner, nor by foreclosure or other proceedings or notice of sale relating to the property, nor by any change in its title or ownership, nor by the occupation of the property for a purpose more hazardous than permitted by the policy, contains two separate contracts of indemnity relating to the same subject but applying to different interests therein, and may be valid as to the interest of the mortgagee, though invalid as to the insured mortgagor, because he had no insurable interest in the property. (R. I.) Smith v. Union Ins. Co., 882.

15. **INSURANCE.—It is not Necessary that the Premium be Paid y the Person Whose Interest is Insured.** Hence, it is no defense o an action by a mortgagee suing on the mortgage clause contained a a policy that the mortgagor who paid the premium had no insurable aterest, as the policy was at no time valid as to him. (R. I.) Smith . Union Ins. Co., 882.

ssignment of Policy.

16. **INSURANCE.—The Assignment of a Policy of Insurance Covrs Only Such Interest as** the insured may have in the property at he time of the insurance and of the loss. The rights of the assignee annot be more extensive than the rights of the assignor. (R. I.) mith v. Union Ins. Co., 882.

'roof of Loss.

17. **INSURANCE—Delay in Making Proof of Loss.**—If a policy of nsurance provides that notice and proof of loss must be furnished rithin a certain time after loss has occurred, but does not impose a orfeiture for failure to furnish them within the time prescribed, nor mpose a forfeiture for a failure to comply with other provisions of he contract, the insured may maintain an action, though he does not urnish notice and proof of loss within the prescribed time, provided e does furnish them at some time prior to commencing his action, lthough the policy provides that no action can be maintained until fter full compliance with all of its requirements. (Tenn.) Continental Fire Ins. Co. v. Whitaker, 916.

djustment and Arbitration.

18. **INSURANCE, FIRE—Adjustment of Loss.**—If a fire insurnce policy provides that if the insurer and insured differ in estiiating the amount of the loss, appraisers shall be appointed to fix he amount, there must be a real difference between the parties efore a demand for appraisers can be made. The fact that the inurer merely declines to pay the amount of loss fixed by an itemized ccount made by the insured is not such real difference between them. Ky.) Continental Ins. Co. v. Vallandingham, 218.

19. **INSURANCE, FIRE—Adjustment of Loss—Refusal to Submit o Arbitration.**—If a fire insurance policy provides that if the insurer nd the insured differ as to the amount of the loss, appraisers shall e appointed to fix the amount, and that no suit shall be brought on he policy until its provisions shall have been complied with, the ailure or refusal of the insured to submit the adjustment of the oss to appraisers, unless he has good cause therefor, is a good deense to a suit on the policy. (Ky.) Continental Ins. Co. v. Vallandigham, 218.

20. **INSURANCE, FIRE—Adjustment of Loss—Submission to Arditration, Waiver of.**—A provision in a fire insurance policy that in ase of a difference between the insured and insurer as to the amount f the loss, that question shall be submitted to appraisers, and that o suit shall be commenced by the insured on the policy until he as complied with such provision is inserted wholly for the protecion of the insurer, and if he attempts to enforce it oppressively, or n bad faith, he must be deemed to have waived the benefit of it. Ky.) Continental Ins. Co. v. Vallandingham, 218.

21. **INSURANCE, FIRE—Adjustment of Loss—Failure to Request rbitration.**—If a person for whose benefit a clause is inserted in an nsurance contract desires to take advantage of it, he must bring imself within its terms, else he will not be excused because the

other party has likewise failed. Thus, unless the insurer asks for arbitration of the loss, before suit brought, if that is provided for in the policy, the failure to arbitrate is not a defense. (Ky.) Continental Ins. Co. v. Vallandingham, 218.

22. **INSURANCE, FIRE—Adjustment of Loss—Arbitration.**—If, the insurer demands arbitration of the loss as provided for in the policy, it must in good faith nominate a competent, disinterested person as an arbitrator, before it can defend upon the ground that the insured has failed to keep that part of his contract. (Ky.) Continental Ins. Co. v. Vallandingham, 218.

23. **INSURANCE, FIRE—Adjustment of Loss—Waiver of Arbitration.**—The insurer, once having waived the right to demand arbitration of the loss under the terms of the policy, cannot require that the matter in dispute be again submitted to arbitrators. (Ky.) Continental Ins. Co. v. Vallandingham, 218.

Fidelity Insurance.

24. **FIDELITY INSURANCE.—The Failure of an Employé to Sign a Bond of Indemnity** renders it entirely inoperative, where such bond declares on its face that it will be invalid unless signed by the employé, and that it is essential to the validity of the bond that his signature to be thereto subscribed, and that these are conditions precedent to the right of the employer to recover under the bond. This freedom from liability on the part of the insurer continues notwithstanding the receipt of premiums and the issuing of two renewal receipts, if they declare that they are subject to all the conditions contained in the original bond. (Md.) Union Central Life Ins. Co. v. United States Fidelity etc. Co., 313.

Reinsurance.

25. **INSURANCE—Reinsurance, Meaning of "Pro Rata" in Contracts of.**—If two insurers obtain reinsurance from a third "the loss, if any, payable pro rata at the same time, and in the same manner as by such companies," the respective amounts of loss which the original insurers and the reinsurer must pay is proportionate to the amount of the original and the amount of the reinsurance, and this proportion cannot be changed by any act of the original insurers in diminishing the amount of the insurance. Hence, if the original insurance was for ten thousand dollars and the reinsurance for five thousand dollars, and afterward the original insurance was reduced to two thousand dollars, and subsequently a loss occurs, the reinsurer's liability is for one-half of the last-named sum only. (N. Y.) Home Insurance Co. v. Continental Ins. Co., 772.

See Benefit Associations.

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evidence, what admissible to prove criminal, 992.

INTEREST.

See Damages, 2.

JUDGMENTS.

1. **JUDGMENTS—Persons not in Being—Ninety-nine Year Lease.** Persons not in esse who may, on the happening of certain contin-

gencies, become interested in a trust estate, may be bound by a decree which approves the making of a lease by the trustee for ninety-nine years, if persons in esse, whose interests are the same, are before the court and have their interests protected by the judgment. (Ill.) Denegre v. Walker, 98.

2. **JUDGMENTS Against Public Officers—Conclusiveness Against County.**—If, under statutes, the sheriff of a county, in so far as his powers relate to taxation, is merely a tax collector, a judgment by default against him in a suit by a taxpayer to enjoin the collection of taxes, to which the county is not made a party is not conclusive or binding on it, in a subsequent action by it to collect such taxes. In such case the sheriff, as tax collector, is not the legal representative of the county or in privity with it, so as to make a judgment against him binding upon the county. (Ky.) Henderson County v. Henderson Bridge Co., 197.

3. **JUDGMENTS—Abatement by Death.**—A judgment against a person upon his conviction for a crime is abated by his death, and cannot be enforced against his personal representative. (Colo.) Overland Cotton Mill Co. v. People, 74.

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Judgments against governmental bodies, when conclusive on persons not parties to the action, 208.
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taxpayers, when bound by judgments against municipalities and other governmental bodies, 208.
taxpayers, when bound by judgments against public officers, 213.
United States, when not bound by a judgment against its agent or officer, 210.

JUDICIAL SALES.

1. **JUDICIAL SALE—Effect of Order Vacating Confirmation.**—After a judicial sale and the entry of an order confirming it, the court has power to vacate the sale and order of confirmation, and such vacating determines the status of the title as between the parties to the sale, and the vacating order cannot be impeached collaterally by an insurance company for the purpose of showing that a sale had been made, and one of the conditions of its policy thereby violated. (Me.) International Wood Co. v. National Assur. Co., 288.

2. **JUDICIAL SALE.—Until the Delivery of a Deed** of real estate sold at a judicial sale the title does not pass. (Me.) International Wood Co. v. National Assur. Co., 288.

3. **DELIVERY OF A BILL OF SALE, What Will not be Deemed to be a.**—Where a receiver is authorized to sell property, and the sale is made and confirmed, with directions for him to deliver a bill of sale on payment of the purchase price, any delivery of such bill in advance of such payment must be regarded as provisional only, and not as passing the title to the property. (Me.) International Wood Co. v. National Assur. Co., 288.

See Executions, 2-5; Executors and Administrators, 10-13.

JURY.

1. **JURY TRIAL—Verdict, When may not be Set Aside.**—A court is not required, or even permitted, to set aside a verdict merely because the jury came to a conclusion different from that to which the court would have come. The jurors have the right for themselves to determine the credibility of the witnesses, how far their stories are true, and, from the truth of the statements thus made, to make all legitimate inferences, and, unless their conclusions are palpably wrong, their verdict cannot be disturbed. (Me.) Butler v. Rockland etc. St. Ry., 267.

2. **TRIAL BY JURY, When not Provided for.**—A statute authorizing the search for, and seizure and destruction of, intoxicating liquors kept for sale in a prohibited district, and that any person on whose premises or in whose custody any such liquor shall be found is entitled to his day in court, and after notice of the charge, to an opportunity to present his defense and meet witnesses, and the benefit of the legal presumption of innocence, a jury not being mentioned, does not provide for, nor require, a jury trial. (Ark.) Kirkland v. State, 25.

3. **JURY TRIAL, Right of, When not Guaranteed by the Constitution.**—The provisions of the constitution that the right to trial y jury shall remain inviolate, and that no person shall be deprived f life, liberty, or property without due process of law, do not guarntee the right to trial by jury except in cases which were so triable t the common law and such as are of similar or analogous nature. Ark.) Kirkland v. State, 25.

4. **JURY TRIALS are not Necessary in Summary Proceedings,** nless the statute so provides. (Ark.) Kirkland v. State, 25.

5. **JURY TRIALS may be Dispensed with in Proceedings in the Iature of Summary Abatements of Public Nuisances,** as, for intance, in proceedings for the seizure and destruction of intoxicating quors kept in a prohibited district, to be sold contrary to law. Ark.) Kirkland v. State, 25.

6. **JURY TRIAL—Improper Remarks by Court.**—Remarks by he court to the jury after it has entered upon its deliberations, urgng it to agree within a certain time, and taken altogether constitutng a threat, that unless it does so agree, to punish it by keeping it onfined during announced long adjournments of the court, are such n invasion of the province of the jury as to constitute reversible rror. (Mo.) State v. Eatherly, 567.

7. **JUROR—Misconduct—Controversy with Counsel.**—A remark y a juror as to the law applicable to the facts of the case, made uring a controversy between him and counsel in the course of the itter's argument, does not justify the setting aside of the verict, where the attorney himself was not without fault, and the udge promptly sustained an objection to the misconduct, and as ar as he could removed any prejudicial effect arising therefrom. Ill.) Schwartz v. McQuaid, 112.

8. **JURY TRIAL, Prayer for Instruction, When Properly Refused.** prayer instructing the jury that the plaintiffs are entitled to reover, provided they find certain facts, should not be given, if there evidence of other facts from which the jury should be justified in rawing a conclusion different from that which the prayer requires hem to find. (Md.) National Bank v. Baltimore etc. R. R., 321.

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Iote.

ury Trial, agreement, calling attention to matters which increase the desirability of, 575.
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LANDLORD AND TENANT.

1. **LEASE—Possession.—If a Lessee Surrenders His Key to the** lessors to enable them to care for the contents of the building while he is detained in jail, he does not thereby part with possession so as to bar himself of the right to maintain trespass for a forcible entry of the premises. (Ill.) Schwartz v. McQuaid, 112.

2. **LEASE—Prior Institution of Partition Proceedings.**—Where a lease is made after the filing of a bill for partition of the premises, but the decree therein does not adjudicate the rights of the lessee and order him to surrender possession, he cannot be forcibly evicted by one deriving title through the partition sale. (Ill.) Schwartz v. McQuaid, 112.

3. **LEASE—Illegal Use of Premises—Rights of Lessee.**—If premises not leased for illegal purposes are nevertheless used for such purposes by the lessee, he is entitled to his day in court before being deprived of the benefits of his lease. (Ill.) Schwartz v. McQuaid, 112.

See Adjoining Owners, 7-8; Tenancy in Common; Trusts, 2.

LARCENY.

1. **HUSBAND AND WIFE, Larceny by Him of Her Property.—At the Common Law** a husband could not be found guilty of larceny in respect to his wife's personal property, because, on their marriage, it became his. (Ark.) Hunt v. State, 34.

2. **HUSBAND AND WIFE, Larceny by Him of Her Property.**—Under a constitutional provision to the effect that all property of any feme covert in this state acquired before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, a husband may be guilty of larceny of his wife's personal property. (Ark.) Hunt v. State, 34.

3. **LARCENY AND EMBEZZLEMENT.—Where a Husband Forms an Intent to Appropriate Money of His Wife** to his own use, and for that purpose obtains a check from her with the professed object of buying property for her, and then, in pursuance of his real and original purpose, appropriates such money to his own use, he is guilty of larceny and not of embezzlement. (Ark.) Hunt v. State, 34.

4. **LARCENY, Variance, When does not Exist.**—Under an indictment for larceny by a husband in stealing money for his wife, proof that he obtained such money by means of a check drawn by her does not constitute a variance, where such check was given him to purchase an interest in certain property, not for himself, but for her. (Ark.) Hunt v. State, 34.

LATERAL SUPPORT.

See Adjoining Owners.

LEASES.

See Landlord and Tenant.

LEGACIES.

See Wills.

LEGISLATURE.

See Constitutional Law.

LIBEL AND SLANDER.

1. **LIBEL—What Words are Libelous Per Se.**—To charge one with being a secret slanderer and scandal-monger, with betraying his friends and telling lodge secrets, is libelous per se. (Ark.) Patton v. Cruce, 46.

2. **LIBEL IN NEWSPAPERS—Answers to, When Privileged.**—If one's good name is assailed in a newspaper, he may reply defending himself, and if his reply is made in good faith, without malice, and not unnecessarily defamatory of his assailant, it is privileged. (Ark.) Patton v. Cruce, 46.

3. **LIBEL.—One Libel cannot be Set Off Against Another.**—Hence, it is no defense to an action of libel that the plaintiff and the defendant voluntarily engaged in a newspaper controversy and lavished slanderous imputations upon each other, and are equally at fault. (Ark.) Patton v. Cruce, 46.

4. **LIBEL—Mitigation of Damages by Counter-libel.**—If one is libeled in a newspaper, and, replying in the heat of passion, goes beyond what is required for a full and fair reply, and publishes an independent libel against his opponent, the original or first libel may be considered by the jury in mitigation of damages. (Ark.) Patton v. Cruce, 46.

5. **LIBEL—Instruction, Where There are Different Counts.**—If, in a complaint for libel, there are several counts, some of which are for matters libelous per se, and other for matters which are not so libelous, an instruction that each count sets up a libel and is libelous per se and the verdict should be for the plaintiff is properly refused. (Ark.) Patton v. Cruce, 46.

LICENSES.

See Municipal Corporations, 27-31.

LIEN.

See Mechanic's Lien.

LIMITATION OF ACTIONS.

1. **STATUTE OF LIMITATIONS.—When Compensation for Services** is not to be made until a certain date, or the happening of a

certain event, full compensation may be recovered at law for all services performed prior to that date, as the statute of limitations does not begin to run until the time so fixed. (N. J. Eq.) Cooper v. Colson, 660.

2. **LIMITATION OF ACTIONS.—Assumption of Mortgage Debt** by the vendee of land converts him into a principal of the mortgage note and the vendor into a surety, and the owner of the note knowing of such arrangement is bound to recognize the parties in these respective capacities. In such case, the vendor and vendee are not joint obligors, and payment of interest by the latter on the mortgage note does not stop the running of the statute of limitations on the note as to the vendor. (Mo.) Regan v. Williams, 600.

3. **LIMITATION OF ACTIONS—Credit on Mortgage Note.**—A credit on a mortgage note made by the trustee of the proceeds realized from a foreclosure sale of the mortgaged property does not stop the running of the statute of limitations in favor of the original payor of the note. (Mo.) Regan v. Williams, 600.

See Adverse Possession; Municipal Corporations, 32-36.

Note.

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See Constitutional Law, 1.

MANDAMUS.

1. **MANDAMUS—Parties.**—Where an alternative writ of mandamus has been issued against a corporation and two of its officers, but on the return of the writ it appears that one of the officers had no authority to act in the premises, the court may direct a peremptory writ to the corporation, and the other officer who has authority to act. (Pa. St.) McClintock v. Young Republicans etc., 784.

2. **MANDAMUS—Parties—Officer Sought to be Removed.**—In mandamus proceedings to compel civil service commissioners to cancel their certificate of the eligibility of an officer, and certify the petitioner for appointment to the office, the officer whose removal is sought is a necessary party. (Ill.) Powell v. People, 117.

3. **MANDAMUS—Parties—Person Collaterally Affected.**—When a person, who is within the jurisdiction of the court, is shown by a petition in mandamus to have a legal interest in the right or duty sought to be enforced, which interest will be collaterally determined if judgment is rendered as prayed, the cause should not be adjudicated until he is made a respondent. (Ill.) Powell v. People, 117.

4. **MANDAMUS—Omission of Party—Reversal on Appeal.**—The omission of a necessary party in a petition for mandamus, the omission appearing upon the face of the record, requires the supreme court, of its own motion, to decline to consider the cause, and to reverse a judgment awarding the writ. (Ill.) Powell v. People, 117.

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MECHANIC'S LIEN.

MECHANIC'S LIEN in Favor of Architect.—An architect who prepares plans and specifications for, and supervises and directs the construction of, a building and fixtures therein, is entitled to a lien thereon under a statute declaring that whenever any building shall be constructed, it, together with the land, is made liable and shall stand pledged for all work done in the construction, erection or reparation of such building. (R. I.) Field v. Consolidated Mineral etc. Co., 895.

MINES AND MINERALS.

1. **MINES AND MINING—Locating Mining Claims—Discovery Notice.**—As against another and subsequent location, a prior lode claim is good, in locating which all statutory requirements have been complied with, except the mere failure to place a discovery notice upon the ground at the point of the only valid discovery made on the claim, if such notice was posted at the point of a former but invalid discovery as recited in the recorded location certificate, and if the boundaries remain the same after as before the true discovery. (Colo.) Treasury Tunnel Mining etc. Co. v. Boss, 60.

2. **MINES AND MINING—Location of Claim—Discovery.**—It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location, and if it appears that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it, and thus avoid the necessity of making a discovery for himself. In order to do this he must claim and adopt such previous discovery as his own and base his location upon it. (Colo.) McMillen v. Ferrum Mining Co., 64.

3. **MINES AND MINING—Location of Claim—Discovery.**—If the locator of a mining claim himself selects the discovery shaft as the one in which the discovery of mineral has been made, and

there posts his location stake and notice, and bases his location upon such discovery, he cannot after intervening rights have attached, abandon such discovery point, neglect to comply with the statute, and then select another discovery upon which his location was not predicated. (Colo.) McMillen v. Ferrum Mining Co., 64.

4. **MINES AND MINING—Location of Claim—Discovery of Mineral.**—If a locator relocates an abandoned mining claim, sinks his discovery shaft, and posts his notice several hundred feet from the discovery shaft of the abandoned claim, designating in his location certificate his discovery as in the shaft sunk by him, but fails to make a discovery of mineral therein, the fact that he knew of a vein of ore on the claim that had been found in the abandoned discovery shaft does not make his location valid. (Colo.) McMillen v. Ferrum Mining Co., 64.

5. **MINES AND MINING—Location of Claim—Underground Discovery.**—If a prior locator for a mining claim claims a discovery of mineral in his discovery shaft on which his location is based, and it appears that no valid discovery has been made in such shaft, it is incompetent for him to prove an underground discovery made through an adjoining claim when such discovery is not followed by filing an amended location certificate, and such discovery was made after a subsequent locator has made a valid discovery of mineral and perfected a location on the same claim. (Colo.) McMillen v. Ferrum Mining Co., 64.

6. **MINES AND MINING—Location of Claim—Discovery—Posting Notice.**—If a locator of a mining claim makes a second discovery of mineral thereon and amends his location certificate so as to base his location on such discovery, it is not necessary to the validity of his claim or location that he post notice at the point of such discovery. (Colo.) McMillen v. Ferrum Mining Co., 64.

MISTAKE.

See Equity.

MONOPOLY.

MONOPOLY — Interstate Commerce — Divisible Contract.—A contract by which the owner of coal lands, coal mines and coal boats sells them and agrees not to engage "in the business of mining, marketing or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi rivers and their tributaries" for ten years is, so far as it affects business carried on beyond the boundaries of Pennsylvania, in violation of the anti-trust or Sherman act; but if the contract is divisible, and valid so far as concerns the coal business in Pennsylvania, the seller may be enjoined from engaging in such business along the Monongahela in Pennsylvania for the period specified. (Pa. St.) Monongahela River etc. Co. v. Jutte, 812.

See Contracts, 6, 7.

MORTGAGE.

In General.

1. **MORTGAGES, Construction of and of Notes They are Given to Secure.**—From the nature of the proceeding authorizing the execution of notes and mortgages by an administrator, they cover the same transaction and must be construed together. (Wis.) Wisconsin Trust Co. v. Chapman, 1032.

2. **MORTGAGE, Right of Subsequent Mortgagee to Contest.**—The fact that a mortgage is excepted from the covenants contained in a subsequent mortgage, there being no agreement to assume it, does not estop the subsequent mortgagee from contesting its validity. (Mass.) Livingstone v. Murphy, 400.

3. **NOTICE.—A Mortgage Which has been Satisfied** and under which no one claims title does not amount to notice to third persons of any of the recitals therein contained. (Mass.) Livingstone v. Murphy, 400.

4. **NOTICE OF CONTRACT to Join in a Mortgage, When not Inferable.**—Where a mortgage is executed by a wife, and her husband joins therein to release his right of curtesy, and the note secured is in fact signed by both, but is in the mortgage stated to be signed by him only, and her claim of title to a part of the property is, as the records show, based upon a void execution sale against him, and it appears that both he and she and the mortgagee acted as though this property was hers, these facts are not sufficient to give notice to third persons that the husband had agreed to join in the mortgage. Hence, the mortgage will not be reformed in equity, nor the execution of a new mortgage compelled, so as to affect the rights of persons claiming under the husband, acquired after the execution of the imperfect mortgage and without actual notice that he had agreed to join therein. (Mass.) Livingstone v. Murphy, 400.

5. **MORTGAGES—Extension of Note.**—An agreement to extend the time of payment of a mortgage note when due, upon payment of the interest and part of the principal, is without consideration, and the creditor may, if he chooses, immediately press for payment despite his agreement to extend, and a surety on the note is not released by such agreement. (Mo.) Regan v. Williams, 600.

6. **BONA FIDE HOLDER or Mortgagor, Who Entitled to Protection as—Consideration of Extension of Time for Payment.**—If the holder of an indebtedness takes a new note therefor, whereby the time of payment is extended, and a mortgage to secure the payment of such note, a new element or consideration is imported into the transaction between the parties, which supports the mortgage as a purchase for a valuable consideration and entitles it to precedence over a mortgage of prior date recorded subsequently to the second mortgage. (N. Y.) O'Brien v. Fleckenstein, 768.

Waiver of Right of Redemption.

7. **MORTGAGE.—An Agreement to Waive the Mortgagor's Right of Redemption** is against public policy, and therefore void. (Mass.) Dessau v. Holmes, 417.

8. **CONDITIONAL SALE, Agreement to Waive Right of Redemption Given by Statute.**—If a statute gives the purchaser under a conditional sale a right of redemption after default in payment, notwithstanding an agreement that his rights shall be lost, a contract waiving this right, and providing that, upon default in any payment, the vendor may take possession of the property without furnishing any itemized statement of the amount due, is against public policy and inoperative. (Mass.) Desseau v. Holmes, 417.

See Chattel Mortgages; Executors and Administrators, 14-17; Fixtures; Limitation of Actions, 2, 3; Notice; Records.

MUNICIPAL CORPORATIONS.

In General.

1. **MUNICIPAL ORDINANCES, Motives for Enactment of.**—The validity of a municipal ordinance authorizing the vacation of

a part of a public street cannot be assailed on the ground that the council adopting it acted from a wrong motive and wholly for the benefit of a private corporation, no corruption, fraud, or want of power being claimed. (Wis.) Tilly v. Mitchell etc. Co., 1007.

2. **MUNICIPAL CORPORATIONS—Home Rule Under the Constitutions of New York.**—Under the various constitutions of New York, the management of the local political business of localities, whether as large as a county or as small as a village, was intrusted to local officers selected by the communities where the officers acted and through which their jurisdiction extended. Unless the office or the officer is mentioned eo nomine in the constitution, the name may be changed or the office abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. Like functions, however, cannot be transferred to a state officer. (N. Y.) People v. State Bd. of Tax Commrs., 674.

3. **MUNICIPAL CORPORATIONS—Fireworks, When Liable for Injuries Done by.**—If a municipal ordinance exists, providing that no person shall fire, discharge, or set off fireworks of any description within the limits of a city, and its board of aldermen adopts, and its mayor approves, a resolution purporting to suspend such ordinance for a time specified so far as it applies to the meetings and parades of political parties, such resolution does not repeal the ordinance, but amounts to a permit to do a prohibited act for a limited period, and makes the city liable for the consequences, as where, through the explosion of the permitted fireworks, personal injuries are suffered by, and death results to, a human being. (N. Y.) Landau v. New York, 709.

4. **MUNICIPAL CORPORATIONS—Police Powers, Contracts Respecting the Exercise of.**—A municipal corporation cannot by contract devest itself of its right to exercise its police powers. (Ark.) Fort Smith v. Hunt, 51.

5. **MUNICIPAL CORPORATIONS—Evasion of Police Power of, by Railroad Company.**—If a corporation contracts to furnish a railroad company with water through conduits, but has no power to construct and maintain them across the streets of a city in which the water is to be delivered, while the railroad company possesses such power, the latter may construct and maintain such conduits, without being guilty of an illegal evasion of the police power of the city. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

Public Property—Dangerous Premises.

6. **MUNICIPAL CORPORATION — Negligent Management of Property.**—A municipal corporation is liable for negligence in the care and control of public property in the discharge of a ministerial duty, irrespective of whether or not an income is derived from it. (Kan.) Bowden v. Kansas City, 187.

7. **MUNICIPAL CORPORATIONS—Public Schools — Negligent Maintenance of Schoolhouse.**—A municipal corporation owning a building within its limits, in the possession and under the control of school authorities and used for public school purposes, is not liable for personal injuries sustained by negligence in the maintenance of such building while used for public school purposes. (Ky.) Ernst v. West Covington, 241.

8. **MUNICIPAL CORPORATION—Safe Place for Firemen to Work.**—A municipal corporation is liable to a fireman for injuries sustained through its negligence in not furnishing him a reasonably safe place to work in one of its fire stations. (Kan.) Bowden v. Kansas City, 187.

9. **MUNICIPAL CORPORATION — Fire Station — Ministerial Duty.**—In the care and management of its fire stations a city discharges a purely ministerial duty. (Kan.) Bowden v. Kansas City, 187.

Public Streets.

10. **MUNICIPAL CORPORATIONS — Legislative Power Over Streets.**—The legislature has power to devest a municipality of all control over its streets, and to authorize their use by corporations without compensation to the municipality. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

11. **PUBLIC STREETS—Change of Grade, Injunction Against.**—Where a change in the grade of a city street is being made in pursuance of valid legislative and municipal authority, a citizen, whether or not his land abuts on the street, whose property is not taken but merely subjected to consequential damages, cannot have the work enjoined until his damages are ascertained and paid, under a constitutional provision that "private property shall not be taken or damaged for public use without just compensation." His remedy, if any, is an action for damages after the completion of the improvements. (Mo.) Clemens v. Conn. Mut. Life Ins. Co., 526.

12. **PUBLIC STREETS—Respective Rights and Remedies of Lot Owners and the Public.**—The owners of lots abutting on streets are permitted to encroach to a limited extent for the necessary transaction of their business upon the primary right of passage of the public, provided they do not unreasonably interfere with its exercise, but the right of the public to employ the streets for the purpose of travel and transportation is the paramount one, and that of the abutter to occupy them for other purposes is a permissive and subordinate one. (Md.) Brauer v. Baltimore etc. Heating Co., 304.

13. **PUBLIC STREETS—Right to Obstruct.—A Merchant or Manufacturer** whose place of business abuts on the street of a populous city, may temporarily obstruct the sidewalk in front of his building in the process of loading or unloading merchandise or the product of his factory, provided he does not unreasonably encumber the footway or interfere with the reasonable use and enjoyment of the adjacent property; but if the adjacent owner suffers special or pecuniary loss from the unreasonable obstruction of the public street, he can maintain an action for damages or file a bill in equity for an injunction, if the nature of his damage is such as to make the latter form of action appropriate. (Md.) Brauer v. Baltimore etc. Heating Co., 304.

14. **PUBLIC STREETS.—The Extent of the Right of an Abutting Owner to Obstruct a Sidewalk** in front of his establishment is not to be determined by the necessity of his business, but by the public convenience and the reasonable enjoyment by adjacent owners of their property. (Md.) Brauer v. Baltimore etc. Heating Co., 304.

15. **PUBLIC STREETS, Unreasonable Use or Obstruction of, What is.**—The maintenance of a platform three and a half feet in height, four feet wide, and fifty-two feet long, on a sidewalk adjoining an abutting property owner's lot for the purpose of loading ice from his factory for several hours of the day on wagons standing at right angles to the platform and across such sidewalk, is an unreasonable use of the public street, which should be enjoined at the instance of the adjacent property owner. (Md.) Brauer v. Baltimore etc. Heating Co., 304.

16. **PUBLIC STREETS, Permission to Obstruct, When Unavailing.** The permission by the board of estimates of the use and obstruction of a sidewalk in front of a public street cannot sanction such use and obstruction for a continuous purpose to the injury of an abutting property owner, when the authority of such board is limited to granting the use of the streets for "bow or bay windows, hitching-posts, area-ways, steps, planting of trees, storm-doors, drains and rain-pipes, and other such temporary or similar uses." (Md.) Brauer v. Baltimore etc. Heating Co., 304.

17. **PUBLIC STREETS, Limitations Upon Control of.—It is not Competent for a Municipal Corporation to confer authority upon a** private person to employ the public streets in any enterprise or occupation which will defeat the primary purpose for which they were dedicated to the public use. (Md.) Brauer v. Baltimore etc. Heating Co., 304.

18. **PUBLIC STREETS—Devoting to Private Uses.**—A public street is reserved for public uses, and none other, and a city council has no power to devote any part to private uses. (Wis.) Tilly v. Mitchell etc. Co., 1007.

19. **STREETS, Public, Authorizing Construction of Bridges or Buildings Over for Private Purposes.**—A municipal ordinance purporting to authorize a private corporation to construct such buildings, bridges, and passageways as its business may require above the surface of a public street, not less than fourteen feet above its surface, provided the passageway is kept lighted, paved, and repaired as required by the council, is void. (Wis.) Tilly v. Mitchell etc. Co., 1007.

20. **INJUNCTION to Prevent Threatened Use of a Public Street.** Where the defendant admits that he intends to construct a platform and make changes in the grade and pavement of a sidewalk and to make a use of such sidewalk, the continuance of which would not be permitted, an injunction may issue at the instance of an abutting property owner without waiting until the actual commission of those acts. (Md.) Brauer v. Baltimore etc. Heating Co., 304.

21. **A MUNICIPAL CORPORATION is Liable for the Consequences of the Unlawful Use of Its Streets,** sanctioned by its permission. (N. Y.) Landau v. New York, 709.

22. **MUNICIPAL CORPORATIONS—Icy Sidewalk—Duty of Abutting Owner.**—The owner of premises, out of possession, with the pavement in proper repair and the properties properly constructed and also in proper repair, is not bound to keep watch and guard over the pavement to prevent the formation of ice upon it, and is not liable for an injury consequent upon a sudden accumulation of ice thereon. (Pa. St.) New Castle v. Kurtz, 798.

23. **MUNICIPAL CORPORATIONS—Icy Sidewalk—Liability of Abutting Owner to City.**—An owner of city property occupied by a tenant is not liable to the municipality for the amount of a verdict recovered against it by a person injured on an icy ridge on the pavement in front of the premises, if the pavement was in a proper state of repair; and the owner had no notice of its icy condition, while the city had and failed to remedy it, and the ice was due to unusual weather. (Pa. St.) New Castle v. Kurtz, 798.

24. **MUNICIPAL CORPORATIONS—Reimbursement for Damages Paid.**—The principle underlying the right of a city to be reimbursed by an abutting property owner for damages paid to a person injured upon a dangerous pavement is that the property owner is primarily liable to the injured person. (Pa. St.) New Castle v. Kurtz, 798.

25. **MUNICIPAL CORPORATION—Highways—Runaway Teams.**—A municipal corporation is liable only to those using the highways in the ordinary manner for the purposes of travel, and a runaway team is not within that use. (Wis.) Ehleiter v. Milwaukee, 1027.

26. **MUNICIPAL CORPORATIONS—Driver's Momentary Loss of Control.**—While a municipal corporation is not liable for injury due to a runaway team, this rule does not apply where the driver's loss of control is momentary only. (Wis.) Ehleiter v. Milwaukee, 1027.

Licenses and Taxes.

27. **MUNICIPAL CORPORATIONS—Taxation for Street Sprinkling—Power to Contract.**—A municipal corporation having power to levy and collect a tax for street sprinkling purposes may contract with another to do the sprinkling and pay him therefor from the fund arising from such taxation. (Ky.) Maydwell v. Louisville, 245.

28. **TAXATION—Public Purpose—Sprinkling City Streets.**—A city may legally levy and collect a tax for street sprinkling purposes, under a constitutional provision that taxes shall be levied and collected for public purposes only. (Ky.) Maydwell v. Louisville, 245.

29. **MUNICIPAL CORPORATIONS—License Fees, Power of to Exact.**—A city, notwithstanding it has enacted an ordinance authorizing an electric company to erect and maintain poles and to string wires thereon in the public streets, and has provided rules and regulations for the government of those maintaining such poles and wires, may by a subsequent ordinance require the owners of every electric light or street railway having poles standing upon a street, avenue or alley of the city to pay an annual license of twenty-five cents per pole, and such ordinance will be construed as imposing a license for paying the expenses of enforcing rules and regulations already in force. (Ark.) Fort Smith v. Hunt, 51.

30. **MUNICIPAL CORPORATIONS.—The Power to License and Regulate,** granted by the state, is deemed to be conferred solely for police purposes, and cannot be used as a means of increasing the municipal revenue. The license fee may be sufficient to cover all expenses of issuing the license and to pay all expenses which may be incurred in the enforcement of such police inspection and superintendence as may be lawfully exercised over the business. (Ark.) Fort Smith v. Hunt, 51.

31. **MUNICIPAL CORPORATIONS—License Fees When will not be Regarded as in Excess of Municipal Power.**—If a license fee exacted by a municipality is not apparently unreasonable, the courts will not interfere with the discretion of the city council in fixing it, and, unless the contrary appears on the face of the ordinance or is established by proper evidence, such fee will be presumed to be reasonable. (Ark.) Fort Smith v. Hunt, 51.

Municipal Bonds—Limitations.

32. **MUNICIPAL BONDS—Limitation of Action on.**—If a municipal bond is made payable at a certain time and place upon presentation, the statute of limitations begins to run against it from maturity, although there is no presentation or demand for payment. (Ky.) Wurth v. Paducah, 225.

33. **MUNICIPAL BONDS—Limitation of Action on—Pleading.**—In an action upon the original promise of a city to pay its bonds, a complaint which fails to allege the recognition by the city of the validity of such bonds and its promise to pay them, made before

the bar of the statute of limitations attached and within the statutory period, and at a time when it was legally bound to pay them, is insufficient to take the case out of the bar of the statute of limitations. (Ky.) Wurth v. Paducah, 225.

34. **MUNICIPAL BONDS—Limitation of Action on.**—The officers of a city cannot, without legislative authority, extend the liability of the city for its indebtedness on bonds beyond the express terms thereof, so as to remove the bar of the statute of limitations. (Ky.) Wurth v. Paducah, 225.

35. **MUNICIPAL BONDS—Limitation of Action on.—The Levy and Collection of a Tax** by a city to pay its bonds do not extend the statutory limitation in which a suit may be maintained thereon. (Ky.) Wurth v. Paducah, 225.

36. **MUNICIPAL BONDS—Limitation of Action on.—The Levy and Collection of a Tax** by a city to pay its bonds do not constitute the taxes collected a trust fund for the payment of the bonds, if suit thereon is barred by limitation. (Ky.) Wurth v. Paducah, 225.

Note.

Municipal Corporations, judgments against their officers, when do not bind, 211.
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Congress, right of to determine the jurisdiction of state courts over, 671.

NEGLIGENCE.

In General.

1. **NEGLIGENCE cannot be Presumed** because a wall cracks or falls. (Md.) Serio v. Murphy, 316.

2. **LOSS, by Whom must be Borne.**—Where a loss has happened which must fall upon one of two innocent persons, it must be borne by him who has occasioned the loss, even without positive fault committed by him, but more especially if there has been any carelessness which has caused or contributed to the misfortune. (Md.) National Bank v. Baltimore etc. R. R., 321.

Contributory Negligence.

See Railroads, 19.

3. **CONTRIBUTORY NEGLIGENCE—Whether a Question of Law.**—Contributory negligence is generally a question of fact, and becomes one of law only when the evidence so clearly fails to establish due care that all reasonable minds would reach the conclusion that there was such negligence. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

4. **CONTRIBUTORY NEGLIGENCE—When a Question of Fact.** If the evidence on the question of contributory negligence is in conflict, or if there is evidence fairly tending to support the verdict, or if reasonable minds might arrive at different conclusions, the question is one of fact for the jury, and its verdict, and the judgment of the trial court affirmed by the appellate court, are final and conclusive. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

5. **NEGLIGENCE, CONTRIBUTORY, When does not Prevent a Recovery.**—Where a plaintiff suing to recover for personal injuries is shown to have been himself guilty of contributory negligence, he

may, nevertheless, recover, if he can show that after his contributory negligence, the defendant, in view of the entire situation, was culpably negligent, and such culpable negligence was the latest in the succession of causes resulting in the plaintiff's injury. (Me.) Butler v. Rockland etc. St. Ry., 267.

6. CONTRIBUTORY NEGLIGENCE Continuing Up to the Time of the Accident precludes the plaintiff's recovery, although the defendant was culpably negligent after discovering such contributory negligence of the plaintiff. Such negligence of the defendant is not subsequent to, and independent of, but is contemporaneous with, the plaintiff's contributory negligence, and where contributory negligence is an operative cause to the last moment and contributes to the injury as a proximate cause, it precludes recovery, although the plaintiff's negligence contributes up to the same moment. (Me.) Butler v. Rockland etc. St. Ry., 267.

7. NEGLIGENCE.—The Doctrine of Contributory and Subsequent Negligence is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous. (Me.) Butler v. Rockland etc. St. Ry., 267.

Proximate Cause.

8. NEGLIGENCE—Proximate Cause.—A Cause is not Too Remote merely because it produces the damages by means of an intermediate agency. Where the injury was the immediate consequence of some peril to which the injured person was obliged to expose himself to avoid the peril arising from the defendant's negligence, it is proximate enough. (Pa. St.) Cohn v. May, 840.

9. NEGLIGENCE.—The Test of Proximate Cause is whether the facts between the negligent act and the final result constitute a continuous succession of events so linked together that they become a natural whole. (Pa. St.) Cohn v. May, 840.

10. NEGLIGENCE—Proximate Cause.—If a Lower Tenant in a building negligently obstructs a stairway, so that when a fire occurs the upper tenant cannot escape by the stairway, and is injured while escaping from a window, the obstruction is the proximate cause of the injury. (Pa. St.) Cohn v. May, 840.

See Damages; Railroads.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

PRACTICE.—A New Trial will be Granted where the preponderance of evidence is against the verdict, and all the circumstances surrounding the transaction in question show the improbability of the proposition which is necessary to sustain the verdict. (Me.) Phillips v. Laughlin, 253.

NICKLE-IN-SLOT MACHINE.

See Gaming, 2.

NOTICE.

NOTICE to One of Two or More Comortgagees that the title of the mortgagor is subject to an outstanding equity is not notice to the other. (R. I.) Babcock v. Wells, 848.

NUISANCE.

NUISANCES.—A Fireworks Exhibition on an Extensive Scale, in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as a matter of law, may properly be found such as a matter of fact. (N. Y.) Landau v. New York, 709.

OFFICERS.

1. **PUBLIC OFFICERS, Power to Appoint is not Necessarily Executive.**—The general power to appoint officers is not inherent in the executive, nor in any other branch of the government. (Ark.) Cox v. State, 17.

2. **PUBLIC OFFICERS, Power in the Legislature to Appoint.**—The legislature has power to make appointments to office, unless its powers are restricted by the constitution expressly or by implication. (Ark.) Cox v. State, 17.

3. **PUBLIC OFFICERS, Power to Appoint, When not Conferred on the Governor by the Constitution.**—Provisions in the constitution of a state declaring that when any office becomes vacant, and no mode is provided by the constitution for filling the vacancy, the governor shall have the power to fill the same by granting a commission which shall expire when the person elected to fill the office at the next general election shall qualify, and that the governor shall, in case a vacancy occurs in any state, district, county, or township office, either by death, resignation, or otherwise, fill the same by appointment to be in force until the next general election, relate solely to elective offices, the incumbents of which are selected at regular intervals, and do not authorize the governor to appoint officers created by laws which provide for their selection by the legislature. (Ark.) Cox v. State, 17.

4. **CONSTITUTIONAL LAW—Public Officers, Appointment or Selection of, by the Legislature.**—A statute providing for state capitol commissioners, and that they shall be elected by the two Houses of the legislature is not unconstitutional, on the ground that the constitution does not permit of the appointment or selection of public officers by the legislature. (Ark.) Cox v. State, 17.

PARENT AND CHILD.

PARENT AND CHILD—Custody of Illegitimate Child.—The putative father of an illegitimate child is entitled to its custody as against all but its mother, and, if she is dead, and the father is a suitable person, he is entitled to the custody of such child as against its maternal uncle. (Miss.) Aycock v. Hampton, 424.

See Railroads, 19.

PARTIES.

See Mandamus.

PARTNERSHIP.

Goodwill.

1. **PARTNERSHIP, Goodwill of, Right of Administrator of Deceased Partner in.**—On the dissolution of a partnership by the death of one of its members, the goodwill of the firm is part of its assets,

which the administrator of the decedent has the right to have sold as such, but a sale thus forced on a surviving partner does not stand on the same footing as a voluntary sale by a sole trader of the goodwill of his business. (Mass.) Hutchinson v. Nay, 390.

2. **PARTNERSHIP, Goodwill of, Effect of Compulsory Sale of as Against Surviving Partner.**—If a sale of the goodwill of a partnership is forced upon the surviving partner by the administrator of a deceased partner, the former is not bound to retire from, but may continue in, business and solicit trade from customers of the old firm. (Mass.) Hutchinson v. Nay, 390.

3. **PARTNERSHIP, Voluntary Sale of Goodwill of by Surviving Partner, Representatives of a Deceased Partner, When not Entitled to an Accounting for.**—If a surviving partner, for nearly two years after the dissolution of the firm by the death of one of its members, continues business at the old stand, dealing with customers of the old firm, there being but little change in the personnel of the customers, and then voluntarily sells the goodwill of the business, with a covenant to continue in the employ of the purchaser for six months and to do all in his power to hold the customers for the purchaser, and not to engage for five years in the business conducted by the old firm in the district covered thereby, the goodwill thus sold is not the goodwill of the old partnership, and the surviving partner is under no obligation to account to the administrator of the decedent for the proceeds. (Mass.) Hutchinson v. Nay, 390.

Dormant Partners.

4. **IN A DORMANT PARTNERSHIP** the funds of the visible partner, and those appearing to be his, although actually belonging to the partnership, are, with respect to the rights of innocent third persons, to be regarded as his sole property. (Me.) White v. Farnham, 261.

5. **PARTNERSHIP, DORMANT, Who can Assert Claim Against Property of.**—If there is a dormant partnership of which the public has no notice, one cannot, under a mortgage purporting to be executed for the partnership by the dormant partner, assert title to property against a trustee in bankruptcy of the other partner, who, without notice of such partnership and without knowledge that the property did not belong wholly to the estate of the bankrupt, sold it as such trustee. (Me.) White v. Farnham, 261.

PASSENGERS.

See Carriers, 29-38; Street Railroads, 9-18.

PENALTIES.

See Corporations, 5-8; Statutes, 2.

PERPETUITIES.

PERPETUITIES.—A Forbidden Perpetuity is not Created where property is devised and bequeathed for a public charity, though the trustees are required to hold the property and accumulate a fund for a period extending beyond the time prescribed in the rule against perpetuities. (Mass.) Codman v. Brigham, 394.

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See Evidence, 1.

PLEADING.

PLEADING.—A Defective Special Denial does not control a good general denial, and a good general denial of each and every allegation of a complaint, not expressly admitted, puts in issue all other allegations, although some of them are impliedly admitted by the defective special denial. (Colo.) Bessemer etc. Ditch Co. v. Wooley, 81.

PLEDGE.

See Trusts, 8-10.

POLICE POWER.

See Constitutional Law; Municipal Corporations, 4, 5.

POLITICAL CLUBS.

See Clubs.

PREPONDERANCE OF EVIDENCE.

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See Evidence, 2.

PRINCIPAL AND AGENT.

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See Bonds.

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RAILROADS.

Powers of Corporation.

1. **RAILROADS—Right to Construct Conduits Across Streets.**—A railroad company having the right to do all acts incidental to the maintenance of its road may lay conduits under the surface of its right of way, and under and across public streets of a city, in order to bring necessary water from the source of supply to the place of use. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

2. **RAILROADS—Incidental Powers.**—In the construction or maintenance of its line of road, a railroad company is vested with all such incidental powers as may be requisite for the successful consummation of the object for which it was granted corporate existence. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

Crossing and Obstructing Streets.

3. **RAILROADS—Power to Cross Streets.**—A railroad company having power to construct and maintain water mains along its right of way, and across public streets, has like power to contract with others to do the work. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

4. **RAILROADS—Power to Cross Streets.**—A railroad company having power granted it to cross any public road or way has power to cross streets, as well as country highways, and its lessee may be invested with like power. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

5. **RAILROADS — Lessee — Temporary Obstruction of Street—Nuisance.**—A temporary and partial obstruction of a public street by a railroad company or its lessee, in laying necessary conduits, is not a nuisance, which is subject to be enjoined. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

Lessee Railroad.

6. **RAILROADS—Lease by Foreign Company.**—A statute authorizing a foreign railroad company to lease domestic railroad companies

may be broad enough to invest the lessee with all of the franchises and powers of the domestic companies. (Miss.) Canton v. Canton Cotton Warehouse Co., 428.

7. **RAILROADS—Lessee—Powers—Eminent Domain.**—The lessee of a railroad invested with all of the lessor's powers, and having the right to do all acts incidental to the maintenance of the road, has a right to lay conduits under the railroad right of way and under and across public streets in order to bring necessary water from the source of supply to the place of use, although it has no right to exercise the power of eminent domain. (Miss.) Canton v. Canton Warehouse Co., 428.

Loading and Unloading Car—Injury from Passing Trains.

8. **RAILROADS—Negligence in Loading Car.—One Who Drives His Team Between the Tracks** of a railroad company, at the direction of its agent, to unload wood from his wagon into the cars, has a right to assume that the company will not render his position hazardous by any act of negligence, and is not, while unloading, bound to exercise that degree of care in looking and listening for approaching trains that would be required of him were he not so engaged. (Ill.) Chicago etc. R. R. Co. v. Crose, 135,

9. **RAILROADS — Negligence in Lading Car. — One Who Drives His Team Between the Tracks** of a railroad company, at the direction of its agent, to unload wood from his wagon into a car, is not, in respect to train running at a speed prohibited by ordinance, negligent as a matter of law. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

10. **CARRIERS, Evidence of Custom as to the Place of Unloading Freight.**—Where an accident has occurred from a collision of a railway train with a wagon being used to unload freight from a car, evidence that the place where such car was is the place where other consignees of freight or their servants were told by the station agent to go into or use for the purpose of unloading goods is admissible. (Mass.) Bachant v. Boston etc. R. R., 408.

11. **CARRIERS.—An Instruction Given by a Station Agent of a Railway to Consignees** or their servants as to the place to go into or use for the purpose of unloading goods from cars is within the scope of his employment and binds his principal. (Mass.) Bachant v. Boston etc. R. R., 408.

12. **CARRIERS, Right to Rely upon Employé's Assurance that a Place is Safe.**—Where one going to a railway station with a wagon for grain is by the agent shown to a car and told to back up to it, and that it was all right, he is justified in relying on this statement as an assurance that the place where the grain is to be unloaded is safe. (Mass.) Bachant v. Boston etc. R. R., 408.

13. **CARRIERS, Delivery, Duty to Supply Safe Place.**—A common carrier is required to provide a safe and proper place for the delivery of goods which have been shipped by it. (Mass.) Bachant v. Boston etc. R. R., 408.

14. **CARRIERS, Right of Persons Unloading Freight.**—One Unloading freight from a car of a railway at a point where it has been placed for that purpose by the carrier has the right to assume that while thus engaged he will not be subjected to injury in person or property by the negligence of the carrier or of its agents. (Mass.) Bachant v. Boston etc. R. R., 408.

15. **CARRIERS, Negligence of, What Constitutes.**—To place a car at a point to be there unloaded and then to run its locomotive so as

to come into collision with a team engaged in such unloading is evidence of negligence on the part of the carrier in the management of its business. (Mass.) Bachant v. Boston etc. R. R., 408.

16. **CARRIERS—Risk of Injury, When not Assumed by Person Unloading Car.**—If a person having grain to unload from a railway car asks permission to do so, he does not assume all risks incident to the situation, where the car had by the carrier been placed in the position where it was for the purpose of being there unloaded, and the grain, if delivered at all, must be taken out where the car had been placed by the carrier, and it appears that the person thus unloading did not know there was danger from collision from passing trains. (Mass.) Bachant v. Boston etc. R. R., 408.

Crossings—Negligence of Traveler.

17. **NEGLIGENCE, CONTRIBUTORY, When must be Inferred.**—If a person seated in a wagon where he could not see a train of cars without looking out, drives in front of a coming train, without so looking, and who, if he looked, must have seen the train when less than two hundred feet away, drives at a walk along the track, and is struck by a train and injured, he must be adjudged guilty of contributory negligence. (Me.) Butler v. Rockland etc. St. Ry., 267.

Infant Trespassers.

18. **RAILROADS—Causing Child to Jump from Moving Car.**—Where a boy climbs upon a box-car as a trespasser, and, while the car is moving at such a speed that it is dangerous for him to get off, he attempts to do so through fear induced by brakemen calling to him to get off and raising a switch club in a threatening manner, the railroad company is answerable for the injuries which he suffers, but not unless the brakemen fail to exercise that prudence and ordinary care which the instincts of humanity and rules of law require in dealing with a child of tender years. (Pa. St.) Pollack v. Pennsylvania R. R. Co. (No. 1), 843.

19. **RAILROADS—Contributory Negligence of Parent.**—If a father takes his nine year old boy to a place where freight-cars are shifted, and leaves him there unprotected, he precludes himself, by such contributory negligence, from a recovery of damages for injuries sustained by the boy through the negligence of the railroad company. (Pa. St.) Pollack v. Pennsylvania R. R. Co. (No. 2), 846.

Excessive Speed.

20. **RAILROADS—Excessive Speed—Proximate Cause.—An Instruction** that it is negligence on the part of a railroad to run its train through a city or village at a rate of speed forbidden by law, and if it does so run its trains and thereby injures the property of one who is himself in the exercise of reasonable care, it is liable, is not objectionable in failing to state that the proximate cause of the injury must be the unlawful speed, for, in effect, it does so state. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

21. **RAILROADS—Excessive Speed—Presumption of Negligence.—An Instruction** that when a railroad runs its trains through a city or village at a greater rate of speed than permitted by ordinance, and stock is injured by such trains, the injury will be presumed to have been done through the negligence of the railroad, does not direct a verdict and is not reversible error. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

22. **RAILROADS—Excessive Speed—Presumption of Negligence.** The violation of a speed ordinance by a railroad company is, under

the Illinois statutes, prima facie, negligence rendering the company liable for damages occasioned thereby; and whether the evidence is sufficient to overcome this prima facie case is a question for the jury. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

See Carriers; Eminent Domain; Street Railroads

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RECEIVERS.

See Judicial Sales, 3.

RECORDS.

1. RECORDS—When Registration Complete.—As soon as a chattel mortgage is deposited for record, it must be presumed to have been transcribed forthwith, and that presumption continues so long as the instrument remains in the clerk's office and until actually transcribed, after which it becomes conclusive; but when the mortgage is taken away from the office without having been recorded, the presumption ceases to exist, and the instrument stands in the same condition, so far as creditors are concerned, as if it had never been lodged for record. (N. J. Eq.) Knickerbocker Trust Co. v. Penn Cordage Co., 640.

2. RECORDS.—A Mortgage Covering Both Real and Personal Property must, to make it a valid lien as against creditors under the New Jersey statutes, be recorded not only among the records of real estate mortgages, but also in one of the books provided for the recording of chattel mortgages, except where the mortgagor is a railroad company. (N. J. Eq.) Knickerbocker Trust Co. v. Penn Cordage Co., 640.

3. RECORDS.—Actual Transcription of a Chattel Mortgage in the records is necessary, under the New Jersey statutes, to make it valid as against creditors. (N. J. Eq.) Knickerbocker Trust Co. v. Penn Cordage Co., 640.

4. COMITY—Priorities.—The doctrine of comity cannot give effect to the registration laws of another state, so as to give nonresidents priority over the liens of resident creditors. (Tenn.) Snyder v. Yates, 941.

See Deeds, 2.

REFORMATION OF INSTRUMENTS.

EQUITY—Reformation of Mortgage.—If a Husband and Wife, to secure their joint note, execute a mortgage which was intended to include all their title to certain lands, but, laboring under the mistaken belief that she owned such land, he joins in the mortgage only so far as to release his estate as tenant by the curtesy, whereas, in fact, he owned part of the land in fee simple, equity, at the instance of the mortgagee, will compel them to execute a new mortgage conveying the entire title of both, and such mortgage, when executed, will be good against all persons who acquired any title or lien after the execution of the imperfect mortgage and with notice of its infirmity. (Mass.) Livingstone v. Murphy, 400.

RELIGION.

See Schools.

REPLEVIN.

REPLEVIN—Deterioration of Property.—A judgment in replevin for the value of a note or its return is not complied with by returning the note if the statute of limitations has run against it during its retention. The defendant is liable for the depreciation in value caused by his retention of the paper. (Kan.) Fair v. Citizens' State Bank, 168.

RES GESTAE.

See Evidence, 13-15.

RESTRAINT OF TRADE.

See Contracts, 6, 7.

RUNAWAY TEAM.

See Highways, 4; Municipal Corporations, 25, 26.

SALES.

In General.

1. **SALES Between Persons in a Fiduciary Relation.**—To sustain a sale between persons standing in a fiduciary relation to each other, the buyer must show affirmatively that the transaction was conducted in perfect good faith, without pressure or influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller. (Kan.) Stewart v. Harris, 178.

2. **SALES, Title, When Does not Pass by.**—Under a contract for the sale and purchase of lumber of different grades to be thereafter manufactured, title does not pass to the purchaser in advance of the actual or constructive delivery of the property to him, and where the seller refuses to abide by the purchaser's inspection, the only remedy of the purchaser for the refusal to deliver is by an action for damages. (Ark.) Deutsch v. Dunham, 21.

Inspection of Goods.

3. **SALE OF CHATTELS, Right to Inspect.**—Where a contract of sale is executory, the purchaser cannot be compelled to accept the property until he has had an opportunity to inspect it and ascertain whether it is such as is stipulated for. (Ark.) Deutsch v. Dunham, 21.

4. **SALE OF CHATTELS, Inspection, When Necessary to Complete.**—Where a contract is for the sale and purchase of lumber of different specified grades, an inspection is necessary to ascertain what are the grades of lumber which have been manufactured. (Ark.) Deutsch v. Dunham, 21.

Implied Warranty.

5. **SALE, Warranty, Implied, When Does not Exist.**—Where the Buyer has an Opportunity of Examining the thing purchased, there is no implied warranty, in the absence of fraud or express warranty that it shall be fit for the purpose for which it was brought. (Md.) Farren v. Dameron, 297.

6. **SALES, Implied Warranties Against Defects Which Subsequently Develop.**—Where oysters are sold and delivered and the purchaser has an opportunity to inspect and does inspect them, and finds them

apparently marketable, the seller is not liable for defects which subsequently develop, as where the oysters, after their acceptance, become "red" or "bloody," and therefore unmerchantable. (Md.) Farren v. Dameron, 297.

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SCHOOLS.

PUBLIC SCHOOL—Religious Teachings.—A teacher who, to quiet the pupils and prepare them for their work, repeats the Lord's Prayer and the Twenty-third Psalm as a morning exercise, without response, comment or remark, the only demand on the pupils being that they should demean themselves in an orderly manner, does not conduct a form of religious worship or teach a sectarian or religious doctrine. (Kan.) Billard v. Board of Education etc., 148.

See Municipal Corporations, 7.

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SIGNATURES.

See Contracts, 1-4.

SLEEPING-CAR COMPANIES.

See Carriers, 34-38.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—Form of Bill.—A bill for specific performance should be a simple statement of the essential facts of the case. (Pa. St.) Henry v. Black, 802.

2. SPECIFIC PERFORMANCE may be Decreed Against a Grantee of the vendor who purchases with full notice of the vendee's rights. (Ark.) Vance v. Newman, 42.

3. SPECIFIC PERFORMANCE—Delay in Tendering Payment.—Where one-third of the purchase price of land has been paid, as stipulated in a contract of sale and purchase, a delay of twenty days after payment becomes due in tendering the amount required does not destroy the right to specific performance, though the value of the land has substantially increased in the meantime owing to the location of a railway. In such circumstances, if the seller wishes to rescind, he should give the purchaser notice that he will do so, unless payment is promptly made. (Ark.) Vance v. Newman, 42.

4. SPECIFIC PERFORMANCE by First Purchaser.—Where the treasurer of a corporation, the business of which is dealing in real estate and taking options, takes an option, with authority from his company, in his own name, to purchase real property, the vendor agreeing to pay the company a fee, and then sells the property, giving a receipt in the name of the corporation to the vendee for a portion of the purchase money; and subsequently the treasurer takes a conveyance of the property in his own name, and makes a deed to a third person having knowledge of the previous transaction, and agreeing to pay a fee to the corporation, the first purchaser may have specific performance against the original owner, the second purchaser, the corporation, and the treasurer. (Pa. St.) Henry v. Black, 802.

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STATUTE OF FRAUDS.

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STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **STATUTES, When Become Laws Without the Governor's Approval, Though They do not Remain in his Hands the Time Prescribed by the Constitution.**—The five days' time allowed the governor for the consideration of bills presented to him for approval or disapproval is a matter of privilege with him which he may waive by notifying the proper House that the bill may become a law without his approval. (Ark.) Hunt v. State, 34.

2. **STATUTES, PENAL, Construction of.**—A penal statutory offense cannot be established by implication, and acts in themselves innocent and lawful cannot be held to be criminal, unless there is clear and unequivocal expression of the legislative intent to make them such. (N. Y.) Burks v. Bosso, 762.

3. **STATUTORY CONSTRUCTION.—If Divers Statutes Relate to the Same Thing,** all should be taken into consideration in construing any one of them; all acts in pari materia are to be taken together as if they were one law. (Pa. St.) Russ v. Commonwealth, 825.

See Conflict of Laws, 2.

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STREET RAILROADS.

Duty and Liability to People in Street.

1. **A STREET RAILWAY COMPANY has the Right to Operate Its Railway in the Location Where it was Placed,** either singly or in trains, having due regard to the safety, not only of travelers upon the street, but of those who may have occasion to cross the track in driving out from the yards of houses situated along the railway. (Me.) Butler v. Rockland etc. St. Ry., 267.

2. **STREET RAILWAYS.—The Speed at Which a Car or Train of Cars may Properly be Run,** or kind of control over it, and the degree of watchfulness imposed upon those in charge, must depend, to some extent, upon surrounding conditions, such as the nearness of the track to the side of the street and to the houses, or the likelihood of persons driving out of yards, and whether the driveways are so situated that persons driving out of them can see or learn of the approach of cars, in season, with due care, to avoid collision. (Me.) Butler v. Rockland etc. St. Ry., 267.

3. **EVIDENCE—Burden of Proof in Actions for Personal Injuries.** In an action against a street railway company to recover for personal injuries due to the collision of its car with a wagon on which the plaintiff was driving, the burden is on him to show that his injuries were caused by the negligent act of the defendant or its servants, and that no want of due care on his part contributed to the injury, or, if he himself was guilty of contributory negligence, that some distinct and later negligence of the defendant was the proximate cause of the injury. (Me.) Butler v. Rockland etc. St. Ry., 267.

4. **STREET RAILWAYS.—The Duty of a Traveler Approaching a Street Railway Crossing** is to exercise care to avoid a collision. The care must be that of an ordinarily prudent man in view of all the existing conditions. (Me.) Butler v. Rockland etc. St. Ry., 267.

5. **STREET RAILWAYS have the Right to Assume that Persons Driving Out of Yards Toward or upon the Track will themselves be in the exercise of ordinary care.** (Me.) Butler v. Rockland etc. St. Ry., 267.

6. **STREET RAILWAYS.—It is the Duty of a Street Railway to Persons upon or Approaching Its Tracks,** in view of apparent dangers, and of those which may reasonably be expected, so to regulate the speed of its cars, so to have them under control, and so to be on the lookout for teams about to cross the track that such persons, if themselves in the exercise of due care, shall not be put in jeopardy. (Me.) Butler v. Rockland etc. St. Ry., 267.

7. **A STREET RAILWAY Corporation may Properly Assume that a Traveler, if Far Enough Away to Cross Safely,** will continue his movements and cross in front of the car, or, if not far enough away, and if warned of the approach of a car, that he will stop and let it pass first. The person in charge of a car must exercise due care and judgment, and the movements of the car must be regulated with reference to the apparent situation. (Me.) Butler v. Rockland etc. St. Ry., 267.

8. **STREET RAILWAYS.—If it be Apparent that a Collision is Likely to Occur,** it is the duty of the servant in control of the car to be ready to use, and to use if necessary, all practicable means to prevent it. Anything less is want of due care. (Me.) Butler v. Rockland etc. St. Ry., 267.

Duty and Liability to Passengers.

9. **STREET RAILROADS—Negligence—Care Required of.—Street-car Companies** are carriers of passengers, and are held to the same degree of care and vigilance in preventing injury to them as is required of other railroads carrying passengers for hire; that is to say, the highest care and skill which prudent men would use and exercise in a like business and under like circumstances. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

10. **STREET RAILROADS—Negligence—Prima Facie Case—Burden of Proof.**—If a street-car company has exclusive control of its street-car and the apparatus propelling it, a passenger who shows that he was injured while sitting in his seat in such car, by its stopping suddenly and abruptly, makes out a prima facie case of negligence against the company, and the burden is then cast upon it to show that the accident was not the result of a want of care and skill, such as is imposed upon common carriers. (Mo.) Redmon v. Metropolitan St. Ry. Co., 558.

11. **STREET RAILWAY.—To Get on or off a Moving Car,** whether propelled by steam or electricity, is negligence per se in him who attempts it. (Pa. St.) Boulfrois v. United Traction Co., 809.

12. **STREET RAILWAY—Boarding Moving Car.**—If a boy's attempt to board a moving car is not complete when a sudden jerk of the car throws him off, the railway company is not liable for the injuries he suffers; but if he gets safely on, and is jerked off before he has time to be seated, the company is liable. (Pa. St.) Boulfrois v. United Traction Co., 809.

13. **STREET RAILWAYS—Passengers—Who are.**—A person attempting to alight from a street-car remains a passenger until he has accomplished the act of alighting in safety, and the company as a carrier of passengers owes to the passenger attempting to alight that very high degree of care and attention which the law puts upon it generally to the end of promoting the safety of its passengers. (Mo.) O'Brien v. St. Louis Transit Co., 592.

14. **STREET RAILWAYS—Liability to Passengers.**—A street-car company is liable absolutely as an insurer for the protection of its passenger against assault or insult at the hands of its own servant, both while such passenger is on its car and while he is attempting to alight. (Mo.) O'Brien v. St. Louis Transit Co., 592.

15. **STREET RAILWAYS.—Assault by Conductor—Duty to Passenger.**—If a street-car conductor engages in a quarrel with a passenger as the latter attempts to alight from the car, and strikes him, and then follows him to the sidewalk and kills him, the duty of the carrier to the passenger still continues, and the conductor is not, when he reaches the sidewalk with the passenger, beyond the field in which his act as servant is chargeable to the master. (Mo.) O'Brien v. St. Louis Transit Co., 592.

16. **STREET RAILWAYS—Assault by Passenger.**—If a passenger on a street-car assaults the conductor thereon, the latter has a right to defend himself, and if in a personal conflict between them brought on by the passenger's wrongful assault, the latter is injured, the railway company is not liable. (Mo.) O'Brien v. St. Louis Transit Co., 592.

17. **STREET RAILWAYS—Passengers—Duty and Rights of Conductors.**—A conductor on a street-car is charged, for the protection of his passengers, with the duty of preserving the peace on his car, but this duty cannot be merged with his right to resent an insult to himself, and it does not justify him in following a passenger to the sidewalk to continue a quarrel with him, nor does it relate to quarrels, entirely off the car, nor does it justify the conductor in using unnecessary force. (Mo.) O'Brien v. St. Louis Transit Co., 592.

18. **STREET RAILWAYS—Assault by Passengers or Conductors.** Although a passenger on a street-car assaults the conductor thereon, this does not of itself justify the conductor in killing the passenger either on or off the car. If the passenger assaults the conductor and pulls him off the car, and a subsequent fight between them results in the killing of the passenger, the car company is not liable, but if, after the passenger assaults the conductor, he tries to get off the car and the conductor holds him and follows him off the car and kills him, the company is liable. (Mo.) O'Brien v. St. Louis Transit Co., 592.

SURETYSHIP.

See Principal and Surety.

Note.

Suretyship, difference between and guaranty, 503.

TAXATION.

In General.

1. **TAXATION—Constitutional Law.—The Entire Taxing Power Belongs to the Legislature,** and not a dollar can be raised for local or general purposes to carry on self-government in a locality or in the state, or to provide for the pubic saftey, order, or health except by its authority. This supreme power should be considered in connection with the home rule provision of the constitution, and neither should be so construed as to embarrass or cripple the other. (N. Y.) People v. State Bd. of Tax Commrs., 674.

2. **ASSESSMENT, When may be Committed to State Boards.**—What are known as the home rule provisions of the constitution of New York do not prevent the legislature from creating a new system

of taxation embracing within it a new character of property, including incidental additions, and committing the power of assessment to a state board of experts under circumstances when its action is justified by a sound public policy. (N. Y.) People v. State Bd. of Tax Commrs., 674.

Franchises.

3. **ASSESSMENT OF FRANCHISE, to What Extent may Include Tangible Property.**—It is no objection to a statute authorizing the assessment of a franchise that it includes therewith tangible property which is an inseparable part of a franchise, and which could neither be used nor sold to advantage except by regarding it and the franchise as constituting a new entity, or as one thing, single and entire. (N. Y.) People v. State Bd. of Tax Commrs., 674.

4. **ASSESSMENT OF FRANCHISE not a Local Matter.**—The function of assessing special franchises does not in its nature belong to a county, city, town, or village, if it has never been exercised by officers of such localities. It is not exclusively local in character, and home rule applies only to functions peculiar to localities. (N. Y.) People v. State Bd. of Tax Commrs., 674.

5. **THE TAXATION of Special Franchises** does not impair the obligation of a contract, and thus violate the federal constitution. (N. Y.) People v. State Bd. of Tax Commrs., 674.

6. **CONSTITUTIONAL LAW—Assessment and Taxation of Franchises.**—A statute authorizing for the first time in the history of a state the assessment, for the purposes of general taxation, of special franchises, to be made by the state board of taxing commissioners to be appointed by the governor, and declaring that the term "real estate" shall include the land itself, and all supports and inclosures for electrical conductors and other appurtenances, all surface, underground, or elevated railroads, including the value of all franchises, rights, or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches, and other fixtures, permitted or authorized to be made, laid, or placed in, upon, above, or under any public or private road, street, or ground; all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance, or product capable of transportation or conveyance therein, or that is protected thereby, including the value of all franchises, rights, or permission to construct, maintain, or operate in, under, above, upon, or through any streets, highways, or public places any mains, pipes, tanks, conduits, or wires with their appurtenances for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic, or other purposes; and that a franchise, right, authority, or permission specified in the statute shall, for the purposes of taxation, be known as a special franchise, and that a special franchise shall be deemed to include the value of the tangible property of the person, copartnership, association, or corporation situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchise; and that the tangible property so included shall be taxed as a part of the special franchise—is not in conflict with the home rule provisions of the constitution of New York, nor with the provisions of the constitution of the United States regarding the impairment of contracts; nor will such statute be declared invalid

because impracticable or incapable of execution, nor because a special franchise should be separately assessed. (N. Y.) People v. State Bd. of Tax Commrs., 674.

Exemptions.

7. **TAXATION, Exemption from.—Unless There is an Express Stipulation** not to tax a franchise or other state grant, the right of taxation is reserved as an attribute of sovereignty. (N. Y.) People v. State Bd. of Tax Commrs., 674.

8. **TAXATION—Exemptions for Religious Purposes.**—A "Young Men's Christian Association," organized for the promotion of religion, morality and intellectual and social improvement, and to endeavor to bring young men under moral and religious influences, owning a building in which religious services and teachings are had every Sunday, conducts a place of religious worship and its building and property, so used, are within the meaning of a constitutional provision exempting from taxation all property used as a place for religious worship. (Ky.) Commonwealth v. Young Men's Christian Assn., 234.

9. **TAXATION—Exemption—Public Charity.**—A "Young Men's Christian Association," organized for the purpose of bringing young men under moral and religious influences, of securing their attendance at some place of worship, and of aiding them, in selecting suitable boarding-houses and employment, owning a building and actually engaged in such work, besides furnishing instruction, keeping open libraries, and performing other charitable work for its members, is an institution of purely public charity, within the meaning of a constitutional provision, exempting the property of such institutions from taxation. This is true, although some part of the expense of maintaining the institution is required to be paid by members who enjoy all its privileges, the membership not conferring any property right. (Ky.) Commonwealth v. Young Men's Christian Assn., 234.

See Judgments, 2; Municipal Corporations, 27-31; Vendor and Vendee, 6.

Note

Taxation, abandonment of power of is not to be presumed, 698.
franchises, grants of do not imply exemption from, 701.
of franchises is constitutional, 701.
all property is presumed to be subject to, 698.

TELEGRAPHS AND TELEPHONES.

1. **TELEGRAPH COMPANIES—Claim for Damages—Time for Filing.**—A stipulation in a contract for the transmission of a telegram, that the telegraph company will not be liable for damages in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, is valid and binding. (Miss.) Hartzog v. Western Union Tel. Co., 459.

2. **TELEPHONE COMPANIES—Negligent Maintenance of Wires—Duty to Licensee.**—If a bare licensee goes under the porch of a building to obtain shelter from a storm, and while there is killed by lightning conducted to his body by a wire negligently maintained by a telephone company over the roof of such building, the company is not liable for his death. It owed him no duty to properly maintain such wire. (Ky.) Cumberland Tel. etc. Co. v. Martin, 229.

TENANCY IN COMMON.

LEASE—Property of Cotenancy.—A Lease Executed by One of four tenants in common, and approved by another, is presumed to have been made with the knowledge and consent of them all. (Ill.) Schwartz v. McQuaid, 112.

TIME.

COMPUTATION OF TIME.—The Word "To" in an order extending time in which to make and serve a case for the supreme court "to the fifteenth day of March," is a word of exclusion, so that the time granted expires at 12 o'clock midnight, March 14th. (Kan.) Maynes v. Gray, 146.

TIME AS ESSENCE.

See Contracts, 5.

TORT-FEASORS.

See Carriers, 31.

TRADEMARKS.

1. **A TRADEMARK does not Pass by Assignment** separate from the business of its owner or of the article which it may serve to designate. Generally, it passes only with the business and goodwill of which it is an inseparable part. (N. Y.) Falk v. American etc. Trading Co., 778.

2. **TRADEMARKS, Assignment of not Accompanied by the Goodwill of the Business.**—If a manufacturer of cigars using a trademark to designate them goes out of business and assigns his trademark to another manufacturer, not accompanied by any business or goodwill, the assignee does not acquire any right to enjoin another from the use of such trademark or to recover damages for its use. (N. Y.) Falk v. American etc. Trading Co., 778.

TRESPASS.

1. **TRESPASS.—Evidence That a Building was in a Dilapidated Condition** is not admissible in an action for trespass in entering it. (Ill.) Schwartz v. McQuaid, 112.

2. **TRESPASS—Entry of Building, When Forcible.**—Entering a building in the possession of another by removing, with at least some force, obstructions placed over an opening in the window, is a trespass. (Ill.) Schwartz v. McQuaid, 112.

TRIAL.

1. **TRIAL—Mixed Proposition of Law and Fact.—A** proposition submitted to the court which requires it not only to adopt the party's view of the law, but also his contention as to disputed facts, is properly refused as presenting a mixed proposition of law and fact. (Ill.) Illinois Central R. R. Co. v. Seitz, 108.

2. **JURY—Viewing Premises.**—A statute making it the duty of the court, in certain cases, upon application of either party to send the jury in a body to view and inspect the premises in dispute, does not apply when the party making the request has not introduced evi-

dence sufficient to make out a case for submission to the jury. (Colo.) **McMillen v. Ferrum Mining Co.**, 64.

See Criminal Law, 2-14; Jury.

TROVER.

See Carrier, 13.

TRUSTS.

In General.

1. **TRUSTEES, When Created.**—If property is by will transferred to executors charged with a trust in its management and disposition, they necessarily take title as trustees, though the word "trustee" is not used. (Mass.) Codman v. Brigham, 394.

2. **TRUSTS—Ninety-nine Year Lease by Trustee.**—Trustees authorized by a will to care for, manage, and rent city real estate, have power, under the direction of a court of chancery, to make a ninety-nine year lease of the property. (Ill.) Denegre v. Walker, 98.

3. **TRUSTS.—The Note of a Trustee is His Personal Obligation,** enforceable against him alone while living, and, after his death, against his estate. (Mass.) Tuttle v. First Nat. Bank, 420.

Constructive and Resulting Trusts.

4. **A RESULTING TRUST is not Created in Favor of a Wife** by her payment of a claim of one of her husband's creditors by means of her purchase of her husband's property at an execution sale against him. (Mass.) Livingstone v. Murphy, 400.

5. **TRUST, CONSTRUCTIVE—Conveyance on Parol Understanding.**—If an aged woman, while sick and not likely to recover, conveys land to one of her sons without consideration, there being a parol understanding that he shall hold it for the benefit of himself and her other children, equity will raise a trust by construction in favor of his brothers and sisters, and require him and his grantee with notice to execute it. (Ill.) Stahl v. Stahl, 101.

Doctrine of Cy Pres.

6. **CY PRES.**—If property is devised and bequeathed to trustees to be held and accumulated for twenty-five years, after which a corporation is to be formed to which the property and accumulations are to be transferred to be used for a specified public charity, such corporation is simply part of the machinery to be provided for the better execution of the charitable purpose, and if for any reason it should be impossible to establish the corporation, the agreement would not fail, but the court would apply the doctrine of cy pres and provide some other method of administering the charity. (Mass.) Codman v. Brigham, 394.

7. **CY PRES, Doctrine of, When** not Applicable.—If [illegible] nd bequest are made to St. Ann's Church for Deaf Mu[illegible] y of New York, to which the testatrix belongs, and in [illegible] a great interest, and which in her lifetime ceases to [illegible] consolidation with another corporation, th[illegible] not applicable, because it cannot be said [illegible] church, because it cared for the religi[illegible] rather than because of the testratrix's a[illegible] ciates who comprehended the church me[illegible] fore lapses. (R. I.) Gladding v. Saint[illegible]

Pledge by Trustee.

8. **TRUSTEE, Pledge by.**—A trustee having power to invest the trust property according to his best judgment, and to pay over the income from time to time to the beneficiaries, and to change any investment at discretion, has no authority to pledge any part of the trust property as security for the payment of a promissory note made by him as trustee, although the money received goes into the trust fund, and is expended for purposes for which the income could rightfully be appropriated. (Mass.) Tuttle v. First Nat. Bank, 420.

9. **TRUSTEE, Unauthorized Pledge by, Pledgee has no Remedy in Equity.**—Where a trustee has, without authority, pledged to a bank shares of stock belonging to the trust, of which the bank has notice, it has no title, and equity will not, as against a successor of the trustee, enforce the repayment of moneys to secure which the pledge was given, though they were used for the benefit of the trust estate. (Mass.) Tuttle v. First Nat. Bank, 420.

10. **TRUSTEE, Duty of Inquiry of Persons Dealing With.**—Where the form of a stock certificate and the accompanying power of attorney show that the shares are held in trust, all persons dealing with them are thus put on inquiry, and must be held to know that the trustee has no authority to pledge them as collateral security for an obligation which is in law his individual debt. (Mass.) Tuttle v. First Nat. Bank, 420.

See Charities; Monopoly.

Note.

United States, judgments against, effect of, 205, 206.
judgments against its officers, when not binding upon, 210.

VENDOR AND VENDEE.

In General.

1. **SALE OR OPTION.**—A bond reciting that C. and C. have bought certain described real property, and have paid a sum specified and are to make further payments of amounts and at dates specified therein, shows that the first payment is on the purchase price and not on an option. (Ark.) Vance v. Newman, 42.

2. **TIME OF PAYMENT, When not of the Essence of a Contract of Purchase.**—Under a contract for the sale and purchase of land specifying several dates on which payments are to be made, it is not essential that such payments be made on the dates so named. (Ark.) Vance v. Newman, 42.

3. **VENDOR AND VENDEE—Forfeiture, Effect of Failure to Declare.**—If a vendor fails to elect to enforce his right of forfeiture for the vendee's default in making payments under a contract for the purchase of land, the vendee continues bound to his obligation to buy and the vendor to his obligation to sell. (Pa. St.) Weaver v. Griffith, 783.

Bona Fide Purchaser.

4. **PURCHASER With Notice from a Purchaser Without Notice.**—If one holds property free from certain equities, because he acquired title without notice of them, a purchaser from him, though with notice, takes all the title which such original purchaser had. (Mass.) Livingstone v. Murphy, 400.

5. **VENDOR AND PURCHASER—Bona Fide Purchaser—Burden of Proof.**—Where real property sold for a valuable consideration and conveyed by a quitclaim is subject to certain equities, the burden of

proving notice of them must be assumed by the person seeking to assert them. (Mass.) Livingstone v. Murphy, 400.

Taxes.

6. **VENDOR AND PURCHASER—Taxes, by Whom Should be Paid.**—After the date of a contract for the sale and purchase of land, it is regarded in equity as belonging and taxable to the purchaser, and to entitle him to specific performance, he must tender to the vendor all subsequently accruing taxes paid by him. (Ark.) Vance v. Newman, 42.

See Frauds, Statute of, 4-12; Limitation of Actions, 2; Specific Performance.

Note.

Vendor and Vendee, demand for money paid under contract void by the statute of frauds, 794.
lien of the latter for moneys paid out on a contract void by the statute of frauds, 797.
recovery by vendee in possession where the contract is void by the statute of frauds, 795.
recovery by vendee of moneys expended where the contract is void by the statute of frauds, 795.
recovery of purchase money by the latter when the vendor does not repudiate his contract, 793, 794.
recovery of purchase money by the latter on the repudiation of his contract by the former, 793.
tender of payment which will enable vendee to recover moneys paid, 794.

WARRANTY.

See Sales, 5, 6.

Note.

Warranty, consideration for, necessity of, 506.
difference between and guaranty, 506.

WATERS AND WATERCOURSES.

1. **WATER RIGHTS—Conveyance of by Deed—After-acquired Property.**—If the habendum clause in a trust deed does not purport to grant any after-acquired property, but merely confirms in the grantee, any estate or title in and to the lands specifically granted which the grantor might thereafter acquire, it cannot operate to convey a water right afterward acquired and applied to the land conveyed. (Colo.) Bessemer etc. Ditch v. Woolley, 91.

2. **WATER RIGHTS, Although They may be Appurtenant to Land,** are the subject of property, and may be transferred, either with or without the land. (Colo.) Bessemer etc. Ditch Co. v. Woolley, 91.

3. **WATER RIGHTS—When Pass by Deed.**—Whether a water right passes as an appurtenance to the land, granted by deed silent as to such water right, depends upon the intention of the grantor, to be ascertained from the circumstances, and whether such right is or is not incident and necessary to the beneficial enjoyment of the land, and in the absence of such showing the water right does not pass as an appurtenance to the land. (Colo.) Bessemer etc. Ditch Co. v. Woolley, 91.

WILLS.

Construction.

1. **WILLS—Intention of Testator—Technical Rules.—In the Construction** of wills, mere technical rules must yield to the obvious intent and purpose of the testator. (Mo.) Gannon v. Albright, 471.

2. **WILLS—Construction.—Effect must be Given to Every Word** in a will, if it is possible without contravening the intention of the testator. (Mo.) Gannon v. Albright, 471.

3. **WILLS—Construction—Interpolation of Words.**—It must be presumed, in construing a will, that the testator used the words he intended to use, and in their plain and ordinarily accepted legal sense, and courts are not justified in interpolating other words and words of entirely different import. (Mo.) Gannon v. Albright, 471.

4. **WILLS—Construction—Cutting Down Estate in Fee.**—When the words of a will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. (Mo.) Gannon v. Albright, 471.

5. **WILLS—What Words Pass a Fee.**—The words: "I give, devise and bequeath to my two sons, and unto their heirs and assigns forever, my farm," in the absence of qualifying words or subsequent limitations, pass a fee simple estate. (Mo.) Gannon v. Albright, 471.

6. **WILLS—Use of "Heirs and Assigns."—Though the Statute Dispenses** with the necessity of using the word "heirs" to pass a fee simple, still the use of the phrase "and unto his heirs and assigns forever" in a will casts no doubt upon the intention of the testator to devise a fee simple. (Mo.) Gannon v. Albright, 471.

7. **WILLS—Use of "Bequeath" in a Devise.**—If a will reads: "I give, devise and bequeath unto my two sons, and unto their heirs and assigns and heirs forever my farm," the use of the word "bequeath" does not weaken the force of the other words. (Mo.) Gannon v. Albright, 471.

8. **WILLS—Construction of Restraint on Alienation.**—If one clause of a will reads: "I give, devise and bequeath to my two sons, and unto their heirs and assigns forever, my farm," a subsequent clause reading: "It is my will that the same shall not be sold, at least not before the younger of the two becomes of age," should be construed to read: "I give my said sons full power to sell and convey said land when the younger becomes of age." (Mo.) Gannon v. Albright, 471.

9. **WILLS—Power of Alienation—Void Limitation Over.**—Where an estate is devised to one and his heirs and assigns forever, and there is added either by express words or by implication an absolute power of alienation, the limitation over, is void. (Mo.) Gannon v. Albright, 471.

10. **WILLS—Fee Tail—Dying Without Issue.**—Section 6 of chapter 32 of the act of 1845 of Missouri, in effect declares that the words "dying without issue" shall mean a failure of issue living at the death of the ancestor named, and the use of such words shall not have the effect of creating a fee tail by implication. (Mo.) Gannon v. Albright, 471.

11. **WILLS—Fee Tail—Executory Devise—Dying Without Issue.**—If a will, in Missouri, contains a devise of a fee simple to the first taker by apt words, and thereafter a gift over on condition that he

die without issue, "dying without issue" means dying without issue living at his death. Therefore, a definite failure of issue is provided, the executory devise over is good, and the first donee takes a fee, defeasible upon his dying without issue, living at his death. (Mo.) Gannon v. Albright, 471.

12. **WILLS—Construction—Dying Without Issue.**—If a will containing a limitation over after the death of the first taker without issue is susceptible of a construction that will make it apply to a definite failure of issue, that construction should be adopted, rather than one making it applicable to an indefinite failure of issue. (Mo.) Gannon v. Albright, 471.

13. **WILLS—Remainder Includes Executory Devise.**—If a statute declares that where a remainder is limited to take effect upon the death of a person without issue, the word "issue" shall be construed to mean issue living at the death of the person named as ancestor, the word "remainder" includes an executory devise. (Mo.) Gannon v. Albright, 471.

Holograph.

14. **WILLS—Letter as Holograph.**—A private letter, testamentary in character, wholly written, dated and signed by the testator, requesting an answer from the addressee, and that the latter should keep the contents of the letter private, is a valid holographic will, although never answered, and although the testator lived several months after writing it. (Miss.) Buffington v. Thomas, 423.

Codicil.

15. **WILLS.—A Codicil does not by Its Republishing Operate to** revive a devise or bequest, the object of which died in the testator's lifetime. (R. I.) Gladding v. Saint Matthew's Church, 904.

After-acquired Realty.

16. **WILLS—After-acquired Realty.—The Intention** of the testator is the controlling guide in determining the disposition of after-acquired real estate; and that intention must be gathered from the four corners of the will, in the light of the circumstances under which it was written. (Mo.) Mueller v. Buenger, 541.

17. **WILLS—After-acquired Realty—Single Devisee.**—If a devise is of the whole estate of the testator to the same beneficiary, it will pass after-acquired property as well as that owned at the time of the making of the will. (Mo.) Mueller v. Buenger, 541.

18. **WILLS—After-acquired Realty—Residuary Devisee.**—If a devise is of a particularly described interest in certain land to a particular devisee, and there is a devise of the residuum of the estate to other particularly named devisees, or to the heirs of the testator generally, any after-acquired interest in the property mentioned in the particular devise will pass to the persons named in the residuary clause, and not to the particular devisee named in the particular devise of the particular interest. (Mo.) Mueller v. Buenger, 541.

19. **WILLS—After-acquired Realty—Residuary Devisee.**—If a testator gives to his niece "my interest in the tract of land owned" by himself and another, and, after specifically providing for other relatives, gives to his wife "all the remainder of my property, both real and personal, I may possess at my death, excepting that which I have mentioned in the first part of this will," and, after making the will, acquires the interest of his co-owner in the tract referred to in the devise to his niece, this after-acquired property passes to his wife and not to his niece. (Mo.) Mueller v. Buenger, 541.

Testator's Statements Invalidating Will.

20. **WILLS, Contradicting Statements in, for the Purpose of Invalidating.**—It is competent by parol evidence to contradict solemn statements contained in an instrument that it is a will and has been signed as such by the person named therein as testator and attested and subscribed by the persons signing as witnesses. (Mass.) Fleming v. Morrison, 386.

21. **WILLS, Testator's Statement that the Instrument was not Intended to Operate as Such.**—Though an instrument purports to be a will and to be signed by the testator and attested and subscribed by the necessary witnesses, it may be proved to be not of testamentary character by evidence that the testator told the witness before whom he first acknowledged it, before they parted, that the instrument was a fake will made for a purpose. (Mass.) Fleming v. Morrison, 386.

22. **WILLS, Acknowledgment of Before Some of the Witnesses When there was No Testamentary Intent.**—If a testator first executes what purports to be a will before a witness and causes its subscription by him as such, and then tells him before they part that it is a fake will, to accomplish a purpose, but afterward changes his mind, and then, with testamentary intent, acknowledges it before and causes it to be subscribed by two other witnesses, it cannot operate as a will, because it is necessary that a testamentary intent exist at the time of acknowledging the will and having it subscribed by each of the required witnesses. (Mass.) Fleming v. Morrison, 386.

Lapsed Legacy—Corporation Ceasing to Exist.

23. **LEGACIES, Lapse of.—Gifts to Charitable Institutions may Lapse,** as well as gifts to natural persons. (R. I.) Gladding v. Saint Matthew's Church, 904.

24. **WILLS—Bequests to Corporations Which Cease to Exist During the Life of the Testator.**—Unless a legatee is in being at the death of the testator, the legacy cannot vest. This rule applies to corporate legatees as well as to natural persons. (R. I.) Gladding v. Saint Matthew's Church, 904.

25. **WILLS—Bequests to a Corporation Which Ceases to Exist Through Its Consolidation with Another.**—If a will purports to make a bequest to a designated corporation, which, during the lifetime of the testator, ceases to exist through its consolidation with another corporation, the latter takes nothing by the bequest, though it was made for a specified purpose carried on by the old and also by the consolidated corporation. (R. I.) Gladding v. Saint Matthew's Church, 904.

See Charities; Frauds, Statute of, 7-10.

WITNESSES.

1. **WITNESS—Impeaching Evidence.—Excluding a Paper from** evidence which contains statements conflicting with the testimony of a witness is not prejudicial, when he admits signing the paper, and the questions and answers are read therefrom by counsel in presence of the jury. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

2. **EVIDENCE, Cross-examination, When Proper.**—Where a party testifies that he supposed when signing a contract that it was a commission agreement, and refused to abide by it upon finding that it was of a different character, it is error to sustain an objection to a question asked on cross-examination as to whether he ever thought of the subject of consignment or of the word "commission" until

after the suit was commenced. (Wis.) Standard Mfg. Co. v. Slot, 1016.

3. EVIDENCE.—The Right of Cross-examination is of great importance in discovering the truth in a judicial investigation, and should be liberally allowed as long as anything of value is called for thereby. (Wis.) Standard Mfg. Co. v. Slot, 1016.

See Evidence.

of taxation embracing within it a new character of property, including incidental additions, and committing the power of assessment to a state board of experts under circumstances when its action is justified by a sound public policy. (N. Y.) People v. State Bd. of Tax Commrs., 674.

Franchises.

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4. **ASSESSMENT OF FRANCHISE not a Local Matter.**—The function of assessing special franchises does not in its nature belong to a county, city, town, or village, if it has never been exercised by officers of such localities. It is not exclusively local in character, and home rule applies only to functions peculiar to localities. (N. Y.) People v. State Bd. of Tax Commrs., 674.

5. **THE TAXATION of Special Franchises** does not impair the obligation of a contract, and thus violate the federal constitution. (N. Y.) People v. State Bd. of Tax Commrs., 674.

6. **CONSTITUTIONAL LAW—Assessment and Taxation of Franchises.**—A statute authorizing for the first time in the history of a state the assessment, for the purposes of general taxation, of special franchises, to be made by the state board of taxing commissioners to be appointed by the governor, and declaring that the term "real estate" shall include the land itself, and all supports and inclosures for electrical conductors and other appurtenances, all surface, underground, or elevated railroads, including the value of all franchises, rights, or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches, and other fixtures, permitted or authorized to be made, laid, or placed in, upon, above, or under any public or private road, street, or ground; all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance, or product capable of transportation or conveyance therein, or that is protected thereby, including the value of all franchises, rights, or permission to construct, maintain, or operate in, under, above, upon, or through any streets, highways, or public places any mains, pipes, tanks, conduits, or wires with their appurtenances for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic, or other purposes; and that a franchise, right, authority, or permission specified in the statute shall, for the purposes of taxation, be known as a special franchise, and that a special franchise shall be deemed to include the value of the tangible property of the person, copartnership, association, or corporation situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchise; and that the tangible property so included shall be taxed as a part of the special franchise—is not in conflict with the home rule provisions of the constitution of New York, nor with the provisions of the constitution of the United States regarding the impairment of contracts; nor will such statute be declared invalid

because impracticable or incapable of execution, nor because a special franchise should be separately assessed. (N. Y.) People v. State Bd. of Tax Commrs., 674.

Exemptions.

7. **TAXATION, Exemption from.—Unless There is an Express Stipulation** not to tax a franchise or other state grant, the right of taxation is reserved as an attribute of sovereignty. (N. Y.) People v. State Bd. of Tax Commrs., 674.

8. **TAXATION—Exemptions for Religious Purposes.**—A "Young Men's Christian Association," organized for the promotion of religion, morality and intellectual and social improvement, and to endeavor to bring young men under moral and religious influences, owning a building in which religious services and teachings are had every Sunday, conducts a place of religious worship and its building and property, so used, are within the meaning of a constitutional provision exempting from taxation all property used as a place for religious worship. (Ky.) Commonwealth v. Young Men's Christian Assn., 234.

9. **TAXATION—Exemption—Public Charity.**—A "Young Men's Christian Association," organized for the purpose of bringing young men under moral and religious influences, of securing their attendance at some place of worship, and of aiding them, in selecting suitable boarding-houses and employment, owning a building and actually engaged in such work, besides furnishing instruction, keeping open libraries, and performing other charitable work for its members, is an institution of purely public charity, within the meaning of a constitutional provision, exempting the property of such institutions from taxation. This is true, although some part of the expense of maintaining the institution is required to be paid by members who enjoy all its privileges, the membership not conferring any property right. (Ky.) Commonwealth v. Young Men's Christian Assn., 234.

See Judgments, 2; Municipal Corporations, 27-31; Vendor and Vendee, 6.

Note

Taxation, abandonment of power of is not to be presumed, 698.
franchises, grants of do not imply exemption from, 701.
of franchises is constitutional, 701.
all property is presumed to be subject to, 698.

TELEGRAPHS AND TELEPHONES.

1. **TELEGRAPH COMPANIES—Claim for Damages—Time for Filing.**—A stipulation in a contract for the transmission of a telegram, that the telegraph company will not be liable for damages in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, is valid and binding. (Miss.) Hartzog v. Western Union Tel. Co., 459.

2. **TELEPHONE COMPANIES—Negligent Maintenance of Wires—Duty to Licensee.**—If a bare licensee goes under the porch of a building to obtain shelter from a storm, and while there is killed by lightning conducted to his body by a wire negligently maintained by a telephone company over the roof of such building, the company is not liable for his death. It owed him no duty to properly maintain such wire. (Ky.) Cumberland Tel. etc. Co. v. Martin, 229.

TENANCY IN COMMON.

LEASE—Property of Cotenancy.—A Lease Executed by One of four tenants in common, and approved by another, is presumed to have been made with the knowledge and consent of them all. (Ill.) Schwartz v. McQuaid, 112.

TIME.

COMPUTATION OF TIME.—The Word "To" in an order extending time in which to make and serve a case for the supreme court "to the fifteenth day of March," is a word of exclusion, so that the time granted expires at 12 o'clock midnight, March 14th. (Kan.) Maynes v. Gray, 146.

TIME AS ESSENCE.

See Contracts, 5.

TORT-FEASORS.

See Carriers, 31.

TRADEMARKS.

1. **A TRADEMARK does not Pass by Assignment** separate from the business of its owner or of the article which it may serve to designate. Generally, it passes only with the business and goodwill of which it is an inseparable part. (N. Y.) Falk v. American etc. Trading Co., 778.

2. **TRADEMARKS, Assignment of not Accompanied by the Goodwill of the Business.**—If a manufacturer of cigars using a trademark to designate them goes out of business and assigns his trademark to another manufacturer, not accompanied by any business or goodwill, the assignee does not acquire any right to enjoin another from the use of such trademark or to recover damages for its use. (N. Y.) Falk v. American etc. Trading Co., 778.

TRESPASS.

1. **TRESPASS.—Evidence That a Building was in a Dilapidated Condition** is not admissible in an action for trespass in entering it. (Ill.) Schwartz v. McQuaid, 112.

2. **TRESPASS—Entry of Building, When Forcible.**—Entering a building in the possession of another by removing, with at least some force, obstructions placed over an opening in the window, is a trespass. (Ill.) Schwartz v. McQuaid, 112.

TRIAL.

1. **TRIAL—Mixed Proposition of Law and Fact.**—A proposition submitted to the court which requires it not only to adopt the party's view of the law, but also his contention as to disputed facts, is properly refused as presenting a mixed proposition of law and fact. (Ill.) Illinois Central R. R. Co. v. Seitz, 108.

2. **JURY—Viewing Premises.**—A statute making it the duty of the court, in certain cases, upon application of either party to send the jury in a body to view and inspect the premises in dispute, does not apply when the party making the request has not introduced evi-

dence sufficient to make out a case for submission to the jury. (Colo.) McMillen v. Ferrum Mining Co., 64.

See Criminal Law, 2-14; Jury.

TROVER.

See Carrier, 13.

TRUSTS.

In General.

1. **TRUSTEES, When Created.**—If property is by will transferred to executors charged with a trust in its management and disposition, they necessarily take title as trustees, though the word "trustee" is not used. (Mass.) Codman v. Brigham, 394.

2. **TRUSTS—Ninety-nine Year Lease by Trustee.**—Trustees authorized by a will to care for, manage, and rent city real estate, have power, under the direction of a court of chancery, to make a ninety-nine year lease of the property. (Ill.) Denegre v. Walker, 98.

3. **TRUSTS.—The Note of a Trustee is His Personal Obligation,** enforceable against him alone while living, and, after his death, against his estate. (Mass.) Tuttle v. First Nat. Bank, 420.

Constructive and Resulting Trusts.

4. **A RESULTING TRUST is not Created in Favor of a Wife** by her payment of a claim of one of her husband's creditors by means of her purchase of her husband's property at an execution sale against him. (Mass.) Livingstone v. Murphy, 400.

5. **TRUST, CONSTRUCTIVE—Conveyance on Parol Understanding.**—If an aged woman, while sick and not likely to recover, conveys land to one of her sons without consideration, there being a parol understanding that he shall hold it for the benefit of himself and her other children, equity will raise a trust by construction in favor of his brothers and sisters, and require him and his grantee with notice to execute it. (Ill.) Stahl v. Stahl, 101.

Doctrine of Cy Pres.

6. **CY PRES.**—If property is devised and bequeathed to trustees to be held and accumulated for twenty-five years, after which a corporation is to be formed to which the property and accumulations are to be transferred to be used for a specified public charity, such corporation is simply part of the machinery to be provided for the better execution of the charitable purpose, and if for any reason it should be impossible to establish the corporation, the agreement would not fail, but the court would apply the doctrine of cy pres and provide some other method of administering the charity. (Mass.) Codman v. Brigham, 394.

7. **CY PRES, Doctrine of, When not Applicable.**—If a devise and bequest are made to St. Ann's Church for Deaf Mutes in the city of New York, to which the testatrix belongs, and in which she takes a great interest, and which in her lifetime ceases to exist through its consolidation with another corporation, the doctrine of cy pres is not applicable, because it cannot be said that the gift was to the church, because it cared for the religious training of deaf mutes rather than because of the testratrix's affection for her former associates who comprehended the church membership. The legacy therefore lapses. (R. I.) Gladding v. Saint Matthew's Church, 904.

Pledge by Trustee.

8. **TRUSTEE, Pledge by.**—A trustee having power to invest the trust property according to his best judgment, and to pay over the income from time to time to the beneficiaries, and to change any investment at discretion, has no authority to pledge any part of the trust property as security for the payment of a promissory note made by him as trustee, although the money received goes into the trust fund, and is expended for purposes for which the income could rightfully be appropriated. (Mass.) Tuttle v. First Nat. Bank, 420.

9. **TRUSTEE, Unauthorized Pledge by, Pledgee has no Remedy in Equity.**—Where a trustee has, without authority, pledged to a bank shares of stock belonging to the trust, of which the bank has notice, it has no title, and equity will not, as against a successor of the trustee, enforce the repayment of moneys to secure which the pledge was given, though they were used for the benefit of the trust estate. (Mass.) Tuttle v. First Nat. Bank, 420.

10. **TRUSTEE, Duty of Inquiry of Persons Dealing With.**—Where the form of a stock certificate and the accompanying power of attorney show that the shares are held in trust, all persons dealing with them are thus put on inquiry, and must be held to know that the trustee has no authority to pledge them as collateral security for an obligation which is in law his individual debt. (Mass.) Tuttle v. First Nat. Bank, 420.

See Charities; Monopoly.

Note.

United States, judgments against, effect of, 205, 206.
judgments against its officers, when not binding upon, 210.

VENDOR AND VENDEE.

In General.

1. **SALE OR OPTION.**—A bond reciting that C. and C. have bought certain described real property, and have paid a sum specified and are to make further payments of amounts and at dates specified therein, shows that the first payment is on the purchase price and not on an option. (Ark.) Vance v. Newman, 42.

2. **TIME OF PAYMENT, When not of the Essence of a Contract of Purchase.**—Under a contract for the sale and purchase of land specifying several dates on which payments are to be made, it is not essential that such payments be made on the dates so named. (Ark.) Vance v. Newman, 42.

3. **VENDOR AND VENDEE—Forfeiture, Effect of Failure to Declare.**—If a vendor fails to elect to enforce his right of forfeiture for the vendee's default in making payments under a contract for the purchase of land, the vendee continues bound to his obligation to buy and the vendor to his obligation to sell. (Pa. St.) Weaver v. Griffith, 783.

Bona Fide Purchaser.

4. **PURCHASER With Notice from a Purchaser Without Notice.**—If one holds property free from certain equities, because he acquired title without notice of them, a purchaser from him, though with notice, takes all the title which such original purchaser had. (Mass.) Livingstone v. Murphy, 400.

5. **VENDOR AND PURCHASER—Bona Fide Purchaser—Burden of Proof.**—Where real property sold for a valuable consideration and conveyed by a quitclaim is subject to certain equities, the burden of

proving notice of them must be assumed by the person seeking to assert them. (Mass.) Livingstone v. Murphy, 400.

Taxes.

6. **VENDOR AND PURCHASER—Taxes, by Whom Should be Paid.**—After the date of a contract for the sale and purchase of land, it is regarded in equity as belonging and taxable to the purchaser, and to entitle him to specific performance, he must tender to the vendor all subsequently accruing taxes paid by him. (Ark.) Vance v. Newman, 42.

See Frauds, Statute of, 4-12; Limitation of Actions, 2; Specific Performance.

Note.

Vendor and Vendee, demand for money paid under contract void by the statute of frauds, 794.
lien of the latter for moneys paid out on a contract void by the statute of frauds, 797.
recovery by vendee in possession where the contract is void by the statute of frauds, 795.
recovery by vendee of moneys expended where the contract is void by the statute of frauds, 795.
recovery of purchase money by the latter when the vendor does not repudiate his contract, 793, 794.
recovery of purchase money by the latter on the repudiation of his contract by the former, 793.
tender of payment which will enable vendee to recover moneys paid, 794.

WARRANTY.

See Sales, 5, 6.

Note.

Warranty, consideration for, necessity of, 506.
difference between and guaranty, 506.

WATERS AND WATERCOURSES.

1. **WATER RIGHTS—Conveyance of by Deed—After-acquired Property.**—If the habendum clause in a trust deed does not purport to grant any after-acquired property, but merely confirms in the grantee, any estate or title in and to the lands specifically granted which the grantor might thereafter acquire, it cannot operate to convey a water right afterward acquired and applied to the land conveyed. (Colo.) Bessemer etc. Ditch v. Woolley, 91.

2. **WATER RIGHTS, Although They may be Appurtenant to Land**, are the subject of property, and may be transferred, either with or without the land. (Colo.) Bessemer etc. Ditch Co. v. Woolley, 91.

3. **WATER RIGHTS—When Pass by Deed.**—Whether a water right passes as an appurtenance to the land, granted by deed silent as to such water right, depends upon the intention of the grantor, to be ascertained from the circumstances, and whether such right is or is not incident and necessary to the beneficial enjoyment of the land, and in the absence of such showing the water right does not pass as an appurtenance to the land. (Colo.) Bessemer etc. Ditch Co. v. Woolley, 91.

WILLS.

Construction.

1. **WILLS—Intention of Testator—Technical Rules.—In the Construction** of wills, mere technical rules must yield to the obvious intent and purpose of the testator. (Mo.) Gannon v. Albright, 471.

2. **WILLS—Construction.—Effect must be Given to Every Word** in a will, if it is possible without contravening the intention of the testator. (Mo.) Gannon v. Albright, 471.

3. **WILLS—Construction—Interpolation of Words.**—It must be presumed, in construing a will, that the testator used the words he intended to use, and in their plain and ordinarily accepted legal sense, and courts are not justified in interpolating other words and words of entirely different import. (Mo.) Gannon v. Albright, 471.

4. **WILLS—Construction—Cutting Down Estate in Fee.**—When the words of a will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. (Mo.) Gannon v. Albright, 471.

5. **WILLS—What Words Pass a Fee.**—The words: "I give, devise and bequeath to my two sons, and unto their heirs and assigns forever, my farm," in the absence of qualifying words or subsequent limitations, pass a fee simple estate. (Mo.) Gannon v. Albright, 471.

6. **WILLS—Use of "Heirs and Assigns."—Though the Statute Dispenses** with the necessity of using the word "heirs" to pass a fee simple, still the use of the phrase "and unto his heirs and assigns forever" in a will casts no doubt upon the intention of the testator to devise a fee simple. (Mo.) Gannon v. Albright, 471.

7. **WILLS—Use of "Bequeath" in a Devise.**—If a will reads: "I give, devise and bequeath unto my two sons, and unto their heirs and assigns and heirs forever my farm," the use of the word "bequeath" does not weaken the force of the other words. (Mo.) Gannon v. Albright, 471.

8. **WILLS—Construction of Restraint on Alienation.**—If one clause of a will reads: "I give, devise and bequeath to my two sons, and unto their heirs and assigns forever, my farm," a subsequent clause reading: "It is my will that the same shall not be sold, at least not before the younger of the two becomes of age," should be construed to read: "I give my said sons full power to sell and convey said land when the younger becomes of age." (Mo.) Gannon v. Albright, 471.

9. **WILLS—Power of Alienation—Void Limitation Over.**—Where an estate is devised to one and his heirs and assigns forever, and there is added either by express words or by implication an absolute power of alienation, the limitation over, is void. (Mo.) Gannon v. Albright, 471.

10. **WILLS—Fee Tail—Dying Without Issue.**—Section 6 of chapter 32 of the act of 1845 of Missouri, in effect declares that the words "dying without issue" shall mean a failure of issue living at the death of the ancestor named, and the use of such words shall not have the effect of creating a fee tail by implication. (Mo.) Gannon v. Albright, 471.

11. **WILLS—Fee Tail—Executory Devise—Dying Without Issue.**—If a will, in Missouri, contains a devise of a fee simple to the first taker by apt words, and thereafter a gift over on condition that he

he without issue, "dying without issue" means dying without issue living at his death. Therefore, a definite failure of issue is provided, the executory devise over is good, and the first donee takes a fee, defeasible upon his dying without issue, living at his death. (Mo.) Gannon v. Albright, 471.

12. **WILLS—Construction—Dying Without Issue.**—If a will containing a limitation over after the death of the first taker without issue is susceptible of a construction that will make it apply to a definite failure of issue, that construction should be adopted, rather than one making it applicable to an indefinite failure of issue. (Mo.) Gannon v. Albright, 471.

13. **WILLS—Remainder Includes Executory Devise.**—If a statute declares that where a remainder is limited to take effect upon the death of a person without issue, the word "issue" shall be construed to mean issue living at the death of the person named as ancestor, the word "remainder" includes an executory devise. (Mo.) Gannon v. Albright, 471.

Holograph.

14. **WILLS—Letter as Holograph.**—A private letter, testamentary in character, wholly written, dated and signed by the testator, requesting an answer from the addressee, and that the latter should keep the contents of the letter private, is a valid holographic will, although never answered, and although the testator lived several months after writing it. (Miss.) Buffington v. Thomas, 423.

Codicil.

15. **WILLS.—A Codicil does not by Its Republishing Operate to** revive a devise or bequest, the object of which died in the testator's lifetime. (R. I.) Gladding v. Saint Matthew's Church, 904.

After-acquired Realty.

16. **WILLS—After-acquired Realty.—The Intention** of the testator is the controlling guide in determining the disposition of after-acquired real estate; and that intention must be gathered from the four corners of the will, in the light of the circumstances under which it was written. (Mo.) Mueller v. Buenger, 541.

17. **WILLS—After-acquired Realty—Single Devisee.**—If a devise is of the whole estate of the testator to the same beneficiary, it will pass after-acquired property as well as that owned at the time of the making of the will. (Mo.) Mueller v. Buenger, 541.

18. **WILLS—After-acquired Realty—Residuary Devisee.**—If a devise is of a particularly described interest in certain land to a particular devisee, and there is a devise of the residuum of the estate to other particularly named devisees, or to the heirs of the testator generally, any after-acquired interest in the property mentioned in the particular devise will pass to the persons named in the residuary clause, and not to the particular devisee named in the particular devise of the particular interest. (Mo.) Mueller v. Buenger, 541.

19. **WILLS—After-acquired Realty—Residuary Devisee.**—If a testator gives to his niece "my interest in the tract of land owned" by himself and another, and, after specifically providing for other relatives, gives to his wife "all the remainder of my property, both real and personal, I may possess at my death, excepting that which I have mentioned in the first part of this will," and, after making the will, acquires the interest of his co-owner in the tract referred to in the devise to his niece, this after-acquired property passes to his wife and not to his niece. (Mo.) Mueller v. Buenger, 541.

Testator's Statements Invalidating Will.

20. **WILLS, Contradicting Statements in, for the Purpose of Invalidating.**—It is competent by parol evidence to contradict solemn statements contained in an instrument that it is a will and has been signed as such by the person named therein as testator and attested and subscribed by the persons signing as witnesses. (Mass.) Fleming v. Morrison, 386.

21. **WILLS, Testator's Statement that the Instrument was not Intended to Operate as Such.**—Though an instrument purports to be a will and to be signed by the testator and attested and subscribed by the necessary witnesses, it may be proved to be not of testamentary character by evidence that the testator told the witness before whom he first acknowledged it, before they parted, that the instrument was a fake will made for a purpose. (Mass.) Fleming v. Morrison, 386.

22. **WILLS, Acknowledgment of Before Some of the Witnesses When there was No Testamentary Intent.**—If a testator first executes what purports to be a will before a witness and causes its subscription by him as such, and then tells him before they part that it is a fake will, to accomplish a purpose, but afterward changes his mind, and then, with testamentary intent, acknowledges it before and causes it to be subscribed by two other witnesses, it cannot operate as a will, because it is necessary that a testamentary intent exist at the time of acknowledging the will and having it subscribed by each of the required witnesses. (Mass.) Fleming v. Morrison, 386.

Lapsed Legacy—Corporation Ceasing to Exist.

23. **LEGACIES, Lapse of.—Gifts to Charitable Institutions may Lapse,** as well as gifts to natural persons. (R. I.) Gladding v. Saint Matthew's Church, 904.

24. **WILLS—Bequests to Corporations Which Cease to Exist During the Life of the Testator.**—Unless a legatee is in being at the death of the testator, the legacy cannot vest. This rule applies to corporate legatees as well as to natural persons. (R. I.) Gladding v. Saint Matthew's Church, 904.

25. **WILLS—Bequests to a Corporation Which Ceases to Exist Through Its Consolidation with Another.**—If a will purports to make a bequest to a designated corporation, which, during the lifetime of the testator, ceases to exist through its consolidation with another corporation, the latter takes nothing by the bequest, though it was made for a specified purpose carried on by the old and also by the consolidated corporation. (R. I.) Gladding v. Saint Matthew's Church, 904.

See Charities; Frauds, Statute of, 7-10.

WITNESSES.

1. **WITNESS—Impeaching Evidence.—Excluding a Paper** from evidence which contains statements conflicting with the testimony of a witness is not prejudicial, when he admits signing the paper, and the questions and answers are read therefrom by counsel in presence of the jury. (Ill.) Chicago etc. R. R. Co. v. Crose, 135.

2. **EVIDENCE, Cross-examination, When Proper.**—Where a party testifies that he supposed when signing a contract that it was a commission agreement, and refused to abide by it upon finding that it was of a different character, it is error to sustain an objection to a question asked on cross-examination as to whether he ever thought of the subject of consignment or of the word "commission" until

after the suit was commenced. (Wis.) Standard Mfg. Co. v. Slot, 1016.

3. EVIDENCE.—The Right of Cross-examination is of great importance in discovering the truth in a judicial investigation, and should be liberally allowed as long as anything of value is called for thereby. (Wis.) Standard Mfg. Co. v. Slot, 1016.

See Evidence.

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